EXCLUSIVE TERRITORIAL ALLOCATION LEGISLATION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SECOND CONGRESS

FIRST SESSION

ON

S. 3040, S. 3116, S. 3133, S. 3145 and S. 3587

BILLS TO PROVIDE THAT UNDER CERTAIN CIRCUMSTANCES EXCLUSIVE TERRITORIAL ARRANGEMENTS SHALL NOT BE DEEMED UNLAWFUL

PART 2

(APPENDIX)

PURSUANT TO S. RES. 256, SECTION 4

AUGUST 8, 9, AND 10 AND SEPTEMBER 12 AND 14, 1972

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PEPSI-COLA BOTTLING COMPANY,
Corvallis, Oreg.

In the July 4 issue of our local newspaper, the headlines read "U.S. Ships Shell North Vietnam by Computer". Captain Edward J. Brown, the commanding officer, called it a classic use of naval gunfire because there is little need for improvisation and virtually no contact with the enemy and the harassment factors is extremely important.

In this city of Washington, D.C. the soft drink bottlers of the country have been bombarded by the computer of the F.T.C. with virtually no contact with the enemy and the harassment impact is extremely high. At least no contact between the F.T.C. computer and the grassroots element of the soft drink industry.

This morning, with your permission and indulgence, I am going to talk about a very popular subject: The little people of America; I am going to also talk about another very popular item which is affecting every human being, and that is ecology. I will also cover a subject that is not at all popular, but very prevalent in our country today and that is cancer. I will finish with a story about the Studebaker automobile.

My name is Mario Pastega. I am of Italian descent. I don't have any God-Father characteristics that deal with violence, because if I did have any such characteristics we could probably make the F.T.C. an offer they couldn't afford to turn down.

My father and mother came to this country some 65 years ago with identification tags on their lapels so that, like a package, they would reach their destination. My father's only assets were his two strong arms and the desire to work. My mother never had any formal education because being from a large family she begged for food to help the family survive. So from my father I learned how to work and from my mother I learned how to give.

I am a small bottler from a small State. The name of my town is Corvallis, Oregon. We are franchised for two counties with a total population of 105,000 people. Because of the small population we have several franchises in order to exist. There are many, many soft drink plants in the United States that are in this small-bottler classification. In fact the majority of the plants are small entities. Some cover many counties, mainly because of the lack of people.

As a small bottler we wear many hats. When a cocktail lounge calls you at midnight and tells you that they have two hours to go before closing and their place is filled with customers and their soft drink dispensing unit isn't functioning you don't call up the computer or refer it to to an answering service—you get out of bed and take care of the problem. We wear the hat of personnel manager because we can't afford one. When production isn't up to par or equipment breaks down, you become a mechanic. When you have to borrow money at the bank for equipment or for construction you become the financial end of the business. If one of our sales employees is disabled, we know how to climb into his route truck and run his route, because that's where most of us received our baptism into this business.

On October 1, 1972 in the State of Oregon, one of the landmarks of ecology will be put into effect because on that day there will be a mandatory deposit on all soft drink and beer containers whether they are reusable or not. Our Governor and Legislature have declared that the flip-top, throw-away society of the 60's must yield to the reusable cycle of the 70's. The small bottler fits into the ecology picture because most small plants are equipped to satisfactorily handle the returnable packages, because in 99% of the plants, the returnable bottle was the basis of their production. The consuming public will be served ecologically and economically because the containers will be recycled.

When the Commanding Officer at the F.T.C. ordered his computer to fire its salvo on the franchise system, what he was really doing was exploding the seeds of cancer—in this instance, the cancer of bigness, and uncontrolled growth gone mad is the deathly result of cancer. What the Commanding Officer at F.T.C. was hearing from the little imp in his computer was—if you destroy the franchise system, you will save the consuming public 500 million dollars a year and a big hero you'll be.

If you are trying a case in court, and you don't have the facts then you first try to befuddle the jury and if that fails you then try the judge. We have the facts and here is how a small bottler views them. If the F.T.C. were to prevail and the franchise system destroyed, in my case, and in that of several thousand bottlers throughout the country just like me, and his would apply in every State which each one of you represent—our neighboring bottlers who are much larger than ourselves would come into our market and take the cream and this would be done initially by lowering prices or literally buying our franchised area for a promotional price. They would keep this up until we were strangled with the small accounts that they could care less about, namely, the small independent grocers; the "mom and pop" stores; the service station; the restaurant; the motel and others of simiiarly small stature. They would enventually force us out of the volume markets because of their pricing tactics. After we were dissolved or forced out at "*flea-market*" prices he, the predatory big-bottler, would then look at his Bible, the verse and chapter listed under R. O. I. in the lay vernacular referred to as Return on Investment. His Bible would then tell him that where the R. O. I. is weak and unsatisfactory and the volume was saturated that the only prayer of survival he would have would be to raise his prices and so the temporary relief from the pain of higher pricing that the consuming public had would become another symptom of the cancer of bigness * * * and still the small independents and others. I above referred to would have to make other arrangements to get product, but all of our services to them would be eliminated; services like on-premise delivery; maintenance in good repair of equipment; promotional activities; customized advertising and also the friendly relationship of customer and client.

Our customer is now receiving all of the above services, and the consuming public in the Northwest, now and for the past two years has been afforded the opportunity to purchase the most nationally known cola and their related products at a per-ounce pricing equivalent to and on many instances, better than pre-World War Two pricing. How many other industries can make a similar statement?

We have all seen the cancer of bigness in the automotive industry. Why have over 400,000 Torino models of Ford been recalled and why are all of the Vegas produced by Chevrolet up to May, 1972 being recalled because of severe defects that could cause bodily harm. I know that the computer didn't catch this part yet, but maybe some of you remember the Studebaker automobile advertisements that boasted of the pride of workmanship (a fact of the above industry that is rapidly disappearing), that was passed on from father to son and both were working for Studebaker and were proud of their years of accomplishment together. In my case I am now at the same cross-roads as Studebaker because it was devoured by the giants and we are in that same process. I am proud to say that I have my three sons working with me in our business. We all have that pride of producing and selling a good product to the consuming public at a reasonable price. This industry of ours has operated with the franchise system for over 70 years and surely you can't say that the consuming public has been overcharged when, in many instances they are able to purchase at prices I referred to. There have been many father to son and to grandson entities.

Our country was made great by its little people and I hope that we won't let a heartless electronic gadget destroy one of the basic roots of our society—the small businessman.

I appreciate your indulgence and it is very difficult to interpret 24 years of work into ten minutes in an effort to save a'l that you have built as it would be for you, in case a proposal, God forbid, were made to abolish the Senate, to present in only ten minutes, your side of the case. Thank you.

Mario Pastega.

FEDERAL TRADE COMMISSION,
Washington, D.C., April 14, 1972.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: Transmitted herewith is a statement prepared jointly by the Bureau of Competition and the Bureau of Economics regarding S. 3040 and identical bills which would amend Section 5 of the Federal Trade Commission Act to permit trerritorial restrictions in licensing contracts involving trademarked manufactured food products, provided such products are in free and open competition with other products and licensees of the same general class, and provided that the licensor retains control over the nature and quality of the product.

The Commission interposed no objection to the submission of a written joint statement by the Bureau of Competition and the Bureau of Economics in opposition to S. 3040 and identical bills. The statement represents the views of the undersigned and has not been examined, passed upon or approved by the Commission or any member of the Commission. Inasmuch as the statement does not constitute an official report of the Commission on the subject bills, it has not been submitted to the Office of Management and Budget (OMB) for coordination and advice. Nevertheless, and with a view to keeping OMB fully informed, copies of the statement have been furnished to that Office for its information.

Commissioner MacIntyre abstained from the Commission's action authorizing the staff to present its views on the proposed legislation.

If you desire any further clarification or additional information about this matter, your request will be acted upon promptly.

Sincerely yours,

ALAN S. WARD,
Director, Bureau of Competition.
H. MICHAEL MANN,
Director, Bureau of Economics.

Enclosure.

FEDERAL TRADE COMMISSION,
Washington, D.C., April 14, 1972.

Hon. HARLEY O. STAGGERS,
Chairman, Interstate and Foreign Commerce Committee, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN STAGGERS: Transmitted herewith is a statement prepared jointly by the Bureau of Competition and the Bureau of Economics regarding H.R. 12261 and identical bills which would amend Section 5 of the Federal Trade Commission Act to permit territorial restrictions in licensing contracts involving trademarked manufactured food products, provided such products are in free and open competition with other products and licensees of the same general class, and provided that the licensor retains control over the nature and quality of the product.

The Commission interposed no objection to the submission of a written joint statement by the Bureau of Competition and the Bureau of Economics in opposition to H.R. 12261 and identical bills. The statement represents the views of the undersigned and has not been examined, passed upon or approved by the Commission or any member of the Commission. Inasmuch as the statement does not constitute an official report of the Commission on the subject bills, it has not been submitted to the Office of Management and Budget (OMB) for coordination and advice. Nevertheless, and with a view to keeping OMB fully informed, copies of the statement have been furnished to that Office for its information.

Commissioner MacIntyre abstained from the Commission's action authorizing the staff to present its views on the proposed legislation.

If you desire any further clarification or additional information about this matter, your request will be acted upon promptly.

Sincerely yours,

ALAN S. WARD,
Director, Bureau of Competition.
H. MICHAEL MANN,
Director, Bureau of Economics.

Enclosure.

Introduction

Enactment of legislation currently pending in Congress would make lawful the territorial restrictions imposed by the eight largest soft drink firms on the 1600 independent bottlers of their brands. These territorial restrictions are currently being challenged as unlawful under Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).[1] Required of the Commission by this Act is issuance of a complaint whenever it has reason to believe that the law is being violated. and that a proceeding by it would be in the public interest. By issuance of complaints in these cases, the Commission announced its determination that these statutory requirements were satisfied. Adjudication of these complaints in adversary proceedings will enable the Commission to develop a full evidentiary record and apply its expertise to determine the competitive consequences of territorial restrictions. The pending legislation, if enacted, will foreclose any proceedings to develop a full evidentiary record upon which the Commission may act to remedy any violation of law which may be found to exist. As is set forth herein, if not prevented by the legislation, these Commission proceedings will make manifest the misconceptions upon which the proposed legislation is based and the anticompetitive effects of territorial restrictions.

Although phrased in terms of "food manufacturing", the proposed legislation represents an attempt by the soft drink industry to negate pending proceedings by the Federal Trade Commission challenging territorial restrictions imposed by the major soft drink syrup manufacturers on their independent bottlers. In recent years similar bills have been opposed both by the Department of Justice and the Federal Trade Commission.[2] In view of the proposed legislation's purpose, including the fact that it was drafted by the National Soft Drink Association (NSDA), our comments on these bills will be in terms of the anticompetitive effects territorial restrictions have in the soft drink industry.

The principal effect of teritorial restrictions in the soft drink industry is the elimination of all *intrabrand* competition by preventing bottlers of the same brands from competing with each other for the same customers. Where *interbrand* competition, *i.e.*, competition among bottlers of different brands, is weak, as it is in the soft drink industry, elimination of intrabrand competition has severe anticompetitive effects.[3]

The syrup manufacturers sell their particular brand name syrups to bottling companies which bottle the syrups in combination with various ingredients (principally carbonated water and sugar). The resulting brand name soft drink products are sold to retailers, but only within territories designated by the syrup manufacturers. In addition to the territorial restriction charge, the complaints in six of the eight cases also charge that these syrup manuffacturers have engaged in illegal market division by preventing their independent bottlers from competing in the territories of bottling companies owned and operated by the syrup manufacturers themselves. The territorial restrictions alleged in all of the cases are *per se* illegal,[4] as are the market division allegations made in six

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[1] These proceedings involve eight firms whose 1970 sales accounted for 84.1% of the total soft drink market. *The Coca-Cola Company,* Docket No. 8855, 42.2% *PepsiCo., Inc.,* Docket No. 8856, 16.6%; *Royal Crown Cola Co.,* Docket No. 8858, 6.6%; *The Seven-Up Co.,* Docket No. 8857, 6.1%; *The Dr. Pepper Co.,* Docket No. 8854, 3.5%; *Beverages International, Inc.,* Docket No. 8853, 3.4%; *Canada Dry Corp.,* Docket No. 8877, 3.3%; *Cott Corp.,* Docket No. 8859, 2.4%. Market share analysis from Soft Drink Industry, *Annual Manual 1971–72,* 12.

[2] Other industries have sought legalization of territorial restrictions in the past and can certainly be expected to seek such legislation in the future if the proposed legislation is passed. For example, H.R. 974, 90th Cong., 1st Sess. (1967), would have amended the antitrust laws so as to permit automobile manufacturers to confine the areas in which their dealers sell and would have also permitted prohibiting dealers from selling automobiles to third parties which, in turn, resold the automobiles. This bill would have made lawful the activities of General Motors in coercing its dealers into not selling cars to discount houses, conduct found unlawful by the Supreme Court in a proceeding brought by the Department of Justice. *United States* v. *General Motors Corp.,* 384 U.S. 127 (1966).

[3] Territorial restrictions also induce greater use of non-price competition between bottlers of different brands. The higher prices which bottlers enjoy due to the lack of intrabrand competition provide bottlers with larger funds for advertising and other forms of non-price competition, which create strong consumer preferences for particular products. and which,in turn, permit bottlers to charge higher prices. For a discussion of the economic effects of territorial restrictions. *See*, Comanor, *Vertical Territorial and Customer Restriction; White Motor and Its Aftermath,* 81 Harv. L. Rev. 1419 (1968).

[4] In *United States* v. *Arnold Schwinn & Co.,* 388 U.S. 365, 379 (1967), the Supreme Court held, "Under the Sherman Act it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."

of the eight cases.[5] The Staff does not intend to rely solely on the *per se* illegality of the practices. Instead, we intend to prove the adverse effects on competition which territorial restrictions have caused in the soft drink industry.

The lessening of competition in the soft drink industry resulting from territorial restrictions may well cost consumers over $250 million a year in higher prices. The adverse effect on consumers, however, is not the only consideration of Congress in assessing the desirability of teritorial restrictions. Another important consideration is the effect on small business. Preserving small business has been a traditional and proper concern of Congress as well as the Commission. We shall demonstrate, however, that enactment of the proposed legislation will do nothing to preserve small soft drink bottlers. Territorial restrictions have encouraged small bottlers to leave the industry by confining their operations to uneconomically small areas, thereby preventing them from growing to efficient size. Thus, legalization of territorial restrictions will only aid those bottlers seeking to sell their business to large multiplant bottlers wanting the right to sell in the smaller bottlers' territories.

The principal beneficiaries of territorial restrictions are large conglomerate corporations such as Westinghouse Electric Corp., Rheingold Corp., Borden, Inc., Beatrice Foods Co., General Tire and Rubber Co., Illinois Central Industries, Inc. and even The Coca-Cola Co. and Pepsi Co, Inc. which are also large bottlers. Indeed, sales by only forty bottling companies constitute more than one-third of the total soft drink market whose sales exceeded $5 billion at wholesale in 1971.

The Staff wishes to emphasize that the Commission's proceedings do not challenge the lawfulness of syrup manufacturers restricting a bottler to a particular manufacturing location or the right of a syrup manufacturer to select its bottlers. Hence, even if territorial restrictions are eliminated, an exclusive right will remain for a bottler of a particular brand to operate a plant producing that brand in a territory designated by the syrup manufacturer. The economic advantage of a bottler being the sole source of a particular brand in a designated area will remain.

If not prevented by the proposed legislation, the full record of the Commission's proceedings will make manifest the following propositions. Each of these propositions is contrary to the assertions of NSDA.

SUMMARY OF STATEMENT

I. Elimination of territorial restrictions will result in lower soft drink prices. Consumers will save $50 million a year for each percentage point the average price of soft drinks drops. Since prices of the same brand of soft drinks within the same market area vary by much more than 5%, consumers may save over $250 million annually.

II. Price competition in the soft drink industry is extremely weak. Interbrand competition is inadequate for the following reasons:

A. Forty-two percent of the bottlers of the brands of the top eight syrup manufacturers (whose brands account for over 80% of total soft drink sales) are multibrand bottlers. For example, Coca-Cola Bottling Co. of New York markets both Coca-Cola and Dr Pepper.

B. Strong consumer preference for particular brands developed by intensive advertising, has further restricted the effectiveness of interbrand competition.

C. The concentration level among local bottlers is extremely high. In a typical market area, four bottlers control 70% of the market. As a general proposition, the higher the degree of concentration, the lower the degree of competition, and the higher the price level.

III. Territorial restrictions result in high local concentration levels which lessen competition and lead to higher prices. Reducing concentration levels by increasing the number of bottlers competing in a market area will benefit consumers in the form of lower prices.

IV. The soft drink bottling industry has increasingly become dominated by large bottling companies and the perpetuation of territorial restrictions will further increase this domination by a few large firms. Forty individual bottling companies account for over one-third of total soft drink sales.

[5] Market division agreements have been considered illegal since at least 1899. *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211 (1899). The *per se* illegality of territorial restrictions and market division agreements is demonstrated by the attached legal memorandum, Appendix A.

V. Territorial restrictions have hastened the demise of small bottlers by limiting them to territories too small to support an efficient-sized plant. Under the present system of restrictions, the number of bottling companies has declined from 5200 to 2300 in the last 25 years. Ending territorial restrictions will not save all small bottlers, but more will ultimately survive without the restrictions than would otherwise be the case, since elimination of restrictions will enable some small bottlers to grow to a more efficient size.

VI. Territorial restrictions have prevented bottlers, retailers and consumers from obtaining the cost savings that central warehousing may offer. We do not advocate the use of any distribution system, but believe that bottlers, wholesalers, and retailers should be free to choose whatever distribution system best suits their needs rather than have a system imposed upon them by the syrup manufacturers.

VII. The proposed legislation will adversely affect all food manufacturing industries, not just the soft drink industry.

I

LOWER SOFT DRINK PRICES FOR CONSUMERS WILL RESULT FROM THE ELIMINATION OF TERRITORIAL RESTRICTIONS

Bottlers can economically serve much larger geographic markets, e.g., 150 miles or more in radius, than the artificial territories their bottler contracts limit them to serving, which may be as small as a tiny county. (See Part V, *infra.*) Within these larger market areas, neighboring bottlers sell the same brand of soft drink at prices which may vary by as much as 30%. If territorial restrictions are removed, food wholesalers and retailers would be free to shop around to purchase soft drinks from the bottler of a particular brand who offered the lowest price and/or best service. As a consequence, soft drink prices in the market area would gravitate toward the lower prices and service would be improved. Competition at the distribution level would insure that food wholesalers and retailers seek purchases from the lowest priced bottler and pass on much of the savings to consumers.

At wholesale, soft drinks sales in 1971 exceeded $5 billion and accounted for about 5% of the nation's food budget. Thus, for each percentage point the average price of soft drink falls, consumers will save $50 million per year on the same quantity of soft drinks purchased. If the average price falls by 5%, consumers savings on the same quantity of soft drinks they now purchase would reach $250 million a year. And since soft drink prices differ by as much as 30% within the same market area consumers may save more than $250 million a year.

NSDA recognizes that eliminating territorial restrictions will cause prices to fall. At page 2 of its "Fact Sheet", it states that the result of eliminating territorial restrictions will be "vicious price wars and the struggle for market territories." This characterization, invidious though it sounds, is nothing more than a description of the free enterprise system—a competitive system which the industry would have Congress help abrogate. Characterization of intrabrand price competition as "vicious" is not an unfamiliar refrain from an industry which is not used to such an experience.

To illustrate the consumer savings which elimination of territorial restrictions would allow, consider this actual situation. Soda Hut, a chain of discount soft drink stores, in Boston, recently sold cases of canned 12 oz. Coca-Cola and Pepsi-Cola for $2.99 a case while local supermarkets charged $3.60. This price saving was made possible by Soda Hut's ability to make large purchases of soft drinks from whatever nearby bottlers offer the best price. From time to time, bottlers have informed Soda Hut that selling soft drinks to it violates their bottling contracts since Soda Hut transports soft drinks outside of the bottlers' territories. Considerable doubts exist as to whether Soda Hut will be able to survive if territorial restrictions are enforced. Thus, consumer savings in the Boston area of 60¢ a case, or 16%, may be lost as a result of territorial restrictions. The reason why discount soft drink stores are only found in a few areas of the country may be the existence of territorial restrictions. Enactment of the proposed legislation will insure Soda Hut's demise and prevent the birth of similar businesses. It will also insure that consumers will continue to pay higher prices for soft drink products than they would otherwise pay if these restrictions were eliminated.

When a bottler needs new equipment or supplies, be it trucks, bottles, sugar or production equipment, he is free to bargain for the best price and service among dealers of each particular brand. That being so, why must a food retailer, when seeking to purchase soft drink products, be required to buy from an exclusive source—that bottler serving the particular territory in which his retail sales outlet happens to be located?

Bottlers seek the advantages of intrabrand competition when they purchase products. They would be incensed if they were told, for example, by a truck dealer that they could purchase from him only if their businesses were located in the truck dealer's territory. Thus, bottlers seek the best of all worlds: the opportunity to purchase in a market in which intrabrand competition exists, but to sell in a protected market in which intrabrand competition has been artifically eliminated.

II

EFFECTIVE PRICE COMPETITION IN THE SOFT DRINK INDUSTRY DOES NOT EXIST

There is a marked lack of meaningful price competition in the soft drink industry, despite assertions by NSDA. For prices to be at lowest levels in a healthy, viable industry, both intrabrand competition, i.e., competition among bottlers of the same brand, and intrabrand competition, i.e., competition among bottlers of different brands, are necessary. This principle applies to all industries. The importance of intrabrand competition is demonstrated by the example of a consumer living in Northwest Washington, who is interested in purchasing a Chevrolet. He does not confine his shopping to Northwest Washington. Instead, he shops throughout the metropolitan area to see which Chevrolet dealer will offer him the best in terms of price and service. But in the soft drink industry a food retailer must purchase his Coca-Cola products only from the bottler in his area. In the Washington, D.C. metropolitan area, a retailer has only one source of Coca-Cola, in spite of the fact that nearby bottlers sell Coke products at much lower prices. The price and service a captive account receives is clearly inferior to that afforded a free account who may go elsewhere for his requirements.

A. Multibrand bottling operations undermine the effectiveness of interbrand competition

NSDA contends that because of the effectiveness of interbrand competition, the fact that retailers and wholesalers are captive accounts is meaningless. But how can interbrand competition be effective in an industry where 42% of the bottlers if the eight largest syrup manufatcurers sell more than one of the eight top brands? Bottlers, not brands, compete in the marketplace. To say that Dr. Pepper effectively competes with Coca-Cola in New York City is overstating the case since both brands are marketed by Coca-Cola Bottling Co. of New York, which is certainly not going to engage in price competition with itself. Similar examples of multibrand bottlers are Coca-Cola Bottling Company of Los Angeles, which also sells Canada Dry products, and Rheingold Corporation which sells Pepsi-Cola, Seven-Up and Dr. Pepper products in Central Florida.

The following figures summarize the extent of multiple brand operations by bottlers of the eight largest syrup manufacturers in 1970:

Bottle products of a single manufacturer	916
Bottle products of two manufacturers	451
Bottle products of three manufacturers	198
Bottle products of four or more manufacturer	89
Total	[6] 1654

B. Strong consumer preferences for particular brands cause a further reduction in the effectiveness of interbrand competition

A further diminution in interbrand competition in the soft drink industry is brought about by the strong consumer preferences which exist for particular brands. Soft drinks are one of the most heavily advertised products sold in the United States. The soft drink industry spends more of its sales dollar on advertising than all but seven of the 133 major domestic industries. For the three-year period 1966–1968, the average advertising to sales ratio for soft drinks was 5.98, considerably in excess of the mean ratio of .90 for the 133 major industries.[7]

[6] Compiled from the *United Beverage Bureau Book* (1971), which is a credit listing of bottlers published annually by the United Beverage Bureau.

[7] Internal Revenue Service, *Corporation Source Book of Statistics on Income*, 1966–68.

Over $350 million in advertising was expended in 1971 in a successful effort to create strong consumer preferences for particular soft drink products.[8]

Elimination of intrabrand competition through territorial restrictions invariably results in higher consumer prices where the products involved have been effectively differentiated. Where strong preferences for particular brands have been created, consumers are generally unwilling to substitute another brand for their preferred brand. Unless effective intrabrand competition exists among the sellers of the preferred brand, the bottler of that brand can raise his price for that brand to that point at which customers who initially preferred the brand will switch to another brand. Sellers of preferred brands, who are free from intrabrand competition, enjoy considerable market power which they can exploit to increase consumer prices. The fact that private label soft drinks sell for about 30% less than nationally advertised brands demonstrates the extent of consumer preferences for brand name soft drinks. Private label products are made from the basic ingredients and by the same process as branded soft drinks, and very often on the same production lines. Yet most consumers refuse to buy private label products and will spend several cents per serving more for a name brand soft drink.

Territorial restrictions result in higher price levels than would exist if the restrictions were eliminated. Higher prices enable bottlers to engage in intensive advertising and promotional expenditures,[9] which reinforce consumer preferences for the heavily differentiated products. Because of the strong preferences, bottlers are able to charge higher prices than they could if the products were not as heavily advertised and promoted. Thus, consumers are caught in a vicious circle: product differentiation leads to higher prices which leads to more product differentiation and still higher prices. This vicious circle often results where competition takes the form of product differentiation.

Ending territorial restrictions will result in lower prices because of more price competition among bottlers. This will reduce the ability of bottlers to engage in advertising and promotional expenditures and will lessen consumer preferences for particular soft drinks. Consumers may be less willing to accept a 30% price difference between branded and private label soft drinks since their preferences for the former may not be sustainable if advertising outlays fall. As consumer preferences for branded soft drinks become less marked, their prices will tend to fall.

C. High concentration levels among local bottlers also vitiate the effectiveness of interbrand competition

Another reason for the ineffectiveness of interbrand competition is the high concentration level in local bottling markets. Generally, four bottlers control over 70% of sales in a local metropolitan market. The prevalence of one bottler selling more than one major brand soft drink increases the concentration level. Throughout the entire economy in areas where a few firms dominate the market, competition among these firms tends to be weak and prices tend to be high. In areas where market shares are more widely distributed, competition tends to be more intense and prices tend to be lower.

Because more bottlers can compete in market areas than those which are currently permitted, concentration levels will fall if restrictions are eliminated. Instead of only one Coke bottler operating in an area, there will be several Coke bottlers. Increased competition will mean lower soft drink price levels since all competitors will have to lower prices or risk lost sales as soon as one competitor lowers his prices.

III

TERRITORIAL RESTRICTIONS RESULT IN HIGH LOCAL CONCENTRATION LEVELS WHICH LESSEN COMPETITION AND LEAD TO HIGHER PRICES

Territorial restrictions raise concentration levels and reduce competition by limiting the number of bottlers which can compete in an area. Ending the restrictions will lower concentration levels by permitting bottlers to compete in much larger areas than the ones to which they are currently restricted. Concentration levels are correlated with competition—the higher the concentration level,

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[8] *Soft Drink Industry,* January 15, 1971, 1. This is an increase from $110 million in 1960 and $210 million in 1966.

[9] Bottlers account for about 30% of the large expenditures for advertising and promotion made in the soft drink industry. Shih and Shih, *American Soft Drink Industry and the Carbonated Beverage Market,* 66 (1965).

the lower the degree of competition and the higher the price level. Reducing concentration levels by increasing the number of bottlers who can compete in an area will benefit consumers in the form of lower prices.

The concentration level among syrup manufacturers is high. The Coca-Cola Company enjoys an estimated 40% of the retail market. The top four firms have about 70%, and the top eight have over 80% of the market.[10] The relative positions of the top firms vary in different regions of the country. For example, Dr Pepper, which is about number four nationally, is number one in some areas of the Southwest.

Concentration among bottlers is similarly high. In 1963 the top four bottlers in nine large metropolitan areas had on the average 68% of the market.[11] Since the brands of the four largest syrup manufacturers have about 70% of the national market, a similar concentration level generally exists at the local level because bottlers' sales reflect the market shares of the brands they produce and sell.

At the local level, where bottlers compete, territorial restrictions cause the level of concentration to be much higher than it would be without restrictions. While currently only one Coke bottler operates in a particular area, ending territorial restrictions could result in several neighboring Coke bottlers operating in that area. In addition, Coke bottlers from more distant areas would be potential competitors, helping to keep prices low. If delivered prices in an area become higher than the delivered prices of the potential competitors, new entrants will be induced into the high price area and offer Coke products at lower prices. Furthermore, since 42% of the bottlers of the brands of the eight largest syrup manufacturers are multibrand bottlers, this may cause an increase in interbrand competition because all multibrand bottlers do not have the same brands in common. For instance, a Seven-Up bottler, who is also a Coca-Cola bottler, may come into competition with a Seven-Up bottler who is also a Pepsi-Cola bottler. Thus, introducing intrabrand competition should help invigorate interbrand competition which is currently weak. To prevent concentration levels from being raised by anticompetitive mergers, the Staff has under investigation numerous acquisitions by large bottling companies.

The end result of decreased concentration is increased competition and invariably lower prices. As we pointed out in Part I, for each percentage decrease in the average price of soft drinks, consumers may save as much as $50 million. Since soft drink prices of different bottlers of the same brands vary in local areas by as much as 30%, the potential savings to the consuming public could be large.

IV

LARGE CORPORATIONS HAVE GAINED AN EVER-INCREASING DOMINANCE OF SOFT DRINK BOTTLING

Soft drink bottling has become increasingly dominated by large companies, contrary to the impression which NSDA has sought to create. Enactment of the proposed legislation will not stop the trend toward this domination. Rather, it will guarantee that conglomerates such as Illinois Central Industries, Inc., Westinghouse Electric Corp., and large, multiplant bottlers such as Coca-Cola Bottling Co. of New York and Allegheny Beverage Corp., will further dominate this industry. From about 5200 firms in 1947[12], the number of bottling companies has declined to 2300 in 1970. Of the 2300 only 1600 bottle one or more of the brands of the eight largest syrup companies whose brands account for over 84% of soft drink sales.[13]

A. Nature Of Corporate Participants In Soft Drink Bottling

There are four types of business organizations in soft drink bottling:

1. Wholly-owned bottling and canning operations of the syrup manufacturers;
2. Bottling plants owned by large conglomerate corporations;
3. Large, multiplant bottling companies; and

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[10] *Soft Drink Industry*, December 31, 1970 at 12.

[11] Bureau of the Census, *Concentration Ratios in Manufacturing Industry 1963*, Table 26, Part II of the Report Prepared by the Bureau of the Census for the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 90th Congress, 1st Sess. (1967).

[12] Bureau of the Census, *Concentration Ratios in Manufacturing Industry, 1963*, Table 2, p. 8, Part I of the Report prepared by the Bureau of the Census for the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 90th Congress, 1st Sess., (1967).

[13] Compiled from 1971 United *Beverage Bureau Book, supra* note. 6.

4. Medium and small, single-plant bottlers.

Firms of the first three types dominate soft drink bottling. They accounted for 62.5% of total industry sales in 1967, the last year for which relevant data are available. Data from the 1972 Census will undoubtedly show a hihger percentage in view of the significant number of mergers and acquisitions in the industry since 1967. Since 1958, when relevant data first became availabe, the percentage of total industry sales accounted for by all multiplant bottlers (types 1 to 3 above) has steadily increased from 43.3% in 1958 to 50.9% in 1963, and most recently, to 62.5% in 1967.[14]

Annual surveys by an industry trade journal, *Soft Drinks*, document the rapidly increasing importance of large bottling plants and the even more rapidly declining importance of small and medium-sized plants. The number of soft drink bottling plants dropped from 3,501 in November 1968, to 2,990 in November 1971. During this time, the percentage of total soft drink sales accounted for by plants with an annual sales volume of over $2 million increased from 54% to 69%, while the percentage of total soft drink sales accounted for by plants with an annual sales volume of $500,000 or less fell from 16% to 10%.[15]

In light of the demonstrated dominance of soft drink bottling by large corporations, the use of the term "bottler" is somewhat inappropriate as it connotes a small, family operation. Actually, a large, multiplant corporation typifies the kind of corporation which dominates bottling. It is the multiplant corporation, not the family bottler, which will obtain the primary benefits of the proposed legislation if it is enacted.

A brief description of the relative importance of each type of multiplant bottler is provided below, and a more detailed description of these bottlers is given in Appendix C.

1. BOTTLING OPERATIONS OF SYRUP MANUFACTURERS

Six of the eight largest syrup manufacturers own and operate bottling or canning facilities.[16] Many of these operations are quite large and are located in major markets.

The Coca-Cola Company owns and operates bottling facilities serving such major U.S. cities as Chicago, San Francisco, Seattle, Oakland, San Jose, Baltimore and Boston. Twenty-eight million people reside in areas of the country in which Coca-Cola brands are bottled solely by the Coca-Cola Company.[17] Similarly, the second largest supplier of soft drink syrup, PepsiCo, Inc., operates an extensive network of bottling facilities which serves such areas as New York City, Boston, Milwaukee, and the entire State of Michigan. Thirty-eight million people reside in areas of the country served by PepsiCo.[18]

In total, sales of the bottling and canning operations of the eight largest syrup manufacturers account for approximately 15% of the total sales of all soft drink products.[19]

2. CONGLOMERATE ACQUISITIONS IN THE BOTTLING INDUSTRY

In recent years, many bottling franchises have been purchased by large conglomerate firms. By virtue of their acquisitions, several conglomerates are among the largest bottlers in the country. Some conglomerates which have recently become substantial bottlers are Westinghouse Electric Corp., Beatrice Foods Co., Illinois Central Industries, Inc., General Tire & Rubber Co., Borden, Inc., Wometco Enterprises, Inc., and General Cinema Corp.

3. LARGE, MULTIPLANT BOTTLING ENTERPRISES

The soft drink companies serving the greatest portion of the United States population are large firms located in metropolitan areas, devoted primarily to

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[14] Compiled from data included in Department of Commerce, *Enterprise Statistics*, 1958, 1963, 1967 (to be published in April 1972).

[15] From annual "How s Business Survey", *Soft Drinks*, January 1969 at 35, January 1972 at 23. Appendix B summarizes the result of these surveys.

[16] Dr. Pepper Co., The Coca-Cola Co., PepsiCo, Inc., Royal Crown Cola Co., Cott Corp., and Canada Dry Corp. have wholly-owned bottling or canning operations. Beverages International, Inc. and Seven-Up Co. do not own bottling operations.

[17] Based on the 1970 populations of territories served by the wholly-owned bottling operations of The Coca-Cola Co.

[18] Based on the 1970 population of territories served by the wholly-owned bottling operations of PepsiCo, Inc.

[19] Based on 1970 population of the territories served by these bottlers, and market share data from *Soft Drink Industry*, December 31, 1970, at 12.

bottling, and generally operating more than one bottling plant. Most of these firms have achieved their present market position by virtue of acquisitions, many of which are the subject of a Commission inquiry into their possible anti-competitive effects. Among such large multiplant bottlers are the Coca-Cola Bottling Company of New York, the Coca-Cola Bottling Company of Los Angeles and Allegheny Beverage Corp.

B. High concentration levels exist in bottling

The 21 largest Coca-Cola bottlers serve over one-half of the United States population and account for approximately 24% of total soft drink sales. The 10 largest Pepsi bottlers serve 45% of the population and account for almost 8% of total soft drink sales. The 11 largest Seven-Up franchisees, two of which are also two of the top 10 Pepsi franchisees, serve 37% of the population and account for approximately 2% of all soft drink sales. *Thus, 40 bottlers account for more than one-third of total soft drink sales.*[20]

Much of the dominant role of large bottlers in this industry has been the result of acquisitions. Syrup manufacturers would apparently like to see bottler acquisitions continue until only one bottler of a brand serves a region consisting of several metropolitan areas. Coca-Cola has stated that it wants to reduce the number of its bottlers from 558 in 1970 to 78 within the next several years.[21]

Since 1960, The Coca-Cola Company has acquired the following bottling operations. Significantly, all acquired companies are adjacent to metropolitan areas already served by one of its wholly-owned bottling facilities:

Company acquired	Date of acquisition	Adjacent metropolitan area served by Coca-Cola prior to the acquisition
1. Coca-Cola Bottling Co. of Salem, Salem, Oreg	March 1960	Portland, Oreg.
2. Tri-City Coca-Cola Bottling Co., Vancouver, Wash	do	Do.
3. Coca-Cola Bottling Works, Gary, Ind	May 1966	Chicago, Ill.
4. Coca-Cola Bottling Co. of San Rafael & Santa Rosa, San Rafael, Calif.	June 1966	San Francisco, Calif.
5. Coca-Cola Bottling Co. of Petaluma & Sonoma, Inc., Petaluma, Calif.	December 1966	Do.
6. Coca-Cola Bottling Co. of Kankakee, Kankakee, Ill	March 1968	Chicago, Ill.
7. Coca-Cola Bottling Co. of San Jose, San Jose, Calif	April 1968	San Francisco, Calif.
8. Coca-Cola Bottling Co. of Worcester, Worcester, Mass	April 1970	Boston, Mass.
9. Tiffin Coca-Cola Bottling Co., Tiffin, Ohio	December 1970	Toledo, Ohio
10. Coca-Cola Bottling Co. of Hood River, Hood River, Oreg	June 1971	Portland, Oreg.

Similar acquisition patterns involving major bottling companies have occurred in other parts of the country. In the instance of Coca-Cola of Los Angeles, since 1964, it has acquired the following eight bottlers:

Year	Location	Brand
1964	Fresno, Calif	Coke.
1965	Las Vegas, Nev	Do.
1966	Needles, Calif	Do.
1967	Santa Barbara, Calif	Do.
1968	Honolulu, Hawaii	Do.
1969	Los Angeles, Calif	Canada Dry.
1970	Ventura, Calif	Coke.
1971	Bakersfield, Calif	Do.

Other active corporate acquirers include Westinghouse Electric Corp., which has become the largest Seven-Up bottler in the nation through acquisitions of Seven-Up bottlers in Southern California and Indiana, and Associated Coca-Cola Bottling Co., Inc., which has been an active acquirer in Florida and New Jersey.

[20] *Id.* Appendix D contains population figures for each of the areas served by the 40 largest bottlers.

[21] Affidavit of Mr. Robert E. Laverty, President, Thriftimart, Inc., in *The Coca-Cola Bottling Co. of Taft* v. *The Coca-Cola Company,* Civ. Action No. 71–270 (C.D. Cal. 1971), a private antitrust action brought by a small Coke Bottler challenging territorial restrictions. Mr. Laverty stated that on July 28, 1971, he was told by Mr. J. Lucian Smith, President of Coca-Cola U.S.A., a division of The Coca-Cola Co., that Coca-Cola's intent was to reduce the number of its bottlers to 78. Mr. Smith also stated that he had a map showing the locations of the 78 and the territories they would serve. *See, Soft Drink Industry,* February 11, 1972 at 23, reporting that The Coca-Cola Company had stated to the Coca-Cola bottlers' organization that the number of Coke bottlers should be reduced to 85 by 1980.

Legalization of territorial restrictions will permit mergers and acquisitions such as these to continue. Coca-Cola's plans to have 78 bottlers might well be realized since legalization of territorial restrictions might immunize soft drink bottling from the sanctions of Section 7 of the Clayton Act, which forbids only acquisitions which substantially lessen competition. Under the proposed legislation, neighboring bottlers of the same brand would not be in competition with each other. Consequently, acquisitions among these neighboring bottlers would not cause a substantial lessing of competition with respect to that brand.[22] The end result is that the active acquirers, including the conglomerates and large bottlers, might be permitted to continue their acquisitions without fear of antitrust prosecution. The Congressional mandate that increases in economic concentration be checked would be frustrated, because Congress would, in effect, place its approval on increased economic concentration if the proposed legislation is enacted.

The Commission's staff currently has underway almost 30 merger investigations concerning acquisitions of bottling companies in the soft drink industry. The Commission has ample authority under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act to prevent a wave of anticompetitive acquisitions from occurring if the proposed legislation is not enacted. Moreover, it should be noted that the Commission's investigations are directed toward acquisitions by large bottlers and does not concern mergers by one small bottler with another small bottler.

NSDA argues that eliminating territorial restrictions will "restructure" the industry from its current "competitive" state to a "highly concentrated one with only a few hundred regional bottlers." (NSDA Statement at 9) However, since territorial restrictions have encouraged the current anticompetitive merger wave among bottlers, their legalization will not help small bottlers to survive. Instead, it will only guarantee that they will be acquired by large bottlers. In view of the current high concentration level among bottlers, the industry cannot properly be characterized as "competitive." Other industries with concentration levels as high as exist in the soft drink industry are characterized as tight oligopolies, and are considered lacking effective competition.[23]

V

THE DEMISE OF SMALL BOTTLERS IS ENCOURAGED BY TERRITORIAL RESTRICTIONS

By confining small bottlers to artificial markets too small to support efficient-sized plants, territorial restrictions have encouraged them to sell their businesses to large bottling companies. The decline in the number of bottlers from 5200 to 2300 in the last 25 years refutes any suggestion that territorial restrictions have helped small bottlers to survive. NSDA and the syrup manufacturers have recognized that these restrictions have made the existence of small bottlers untenable. Continuation of territorial restrictions will bring about the very condition which NSDA decries—a soft drink industry "with only a few hundred regional bottlers." (NSDA Statement, p. 9.) The Commission seeks to assure the competitive vability of many more.

Ending territorial restrictions will not save all small bottlers but it will insure that more will ultimately survive than would otherwise be the case. Without the restrictions, small bottlers, all of whom have the ability to serve larger areas, may grow large enough to support an efficient-sized plant. Furthermore, mergers among many of the smaller bottlers would create efficient-sized plants. In addition, small bottlers could pool their resources to create jointly-owned production cooperatives. For instance, in 1969, 32% of all Pepsi-Cola bottlers obtained their canned soft drinks from eight canning cooperatives.[24]

The smallest bottlers today have territories so small that they cannot even have one bottling line of minimum efficient size that operates five days per week. Such bottlers have rapidly been exiting from the market, usually selling their franchises to nearby bottlers, which simply liquidate the acquired plants and

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[22] Similarly subverted are Sections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. 13(d), 13(e), which prohibit the granting of all but proportionately equal promotional allowances or services to *competing* customers. Syrup manufacturers may discriminate unfairly among their franchised bottlers; yet, since the bottlers do not compete with one another, enforcement of the Robinson-Patman Act might be impaired.

[23] *See, e.g., Cabinet Committee on Price Stability, Industrial Structure and Competition Policy, Study Paper No. 2*, 54 (1969) *Scherer, Industrial Market Structure and Economic Performance*, 465–66 (1970).

[24] PepsiCo, Inc., *1969 Annual Report*, 7.

serve the additional territory from their present facilities. For example, Associated Coca-Cola Corp. has followed a policy of closing down the production facilities of the small bottlers, it has acquired in Florida and New Jersey and now serves their former areas from centralized plants.

That bottlers with small areas may have uneconomical operations is demonstrated by statements from soft drink industry spokesmen:

1. Charles W. Adams, Senior Vice President, The Coca-Cola Company, has stated

> * * * traditional geographic boundaries have become uneconomic for bottlers.[25]

2. Sidney Mudd, President, Seven-Up Bottling Company of New York, and Chairman of the NSDA committee studying territorial restrictions, has stated

> * * * if you are small in territory, small in sales, or small in resources you will be a whole lot better off as a small part of a successful whole than the one and only part of a struggle to survive. You might even become a distributor for your own lines and some of your neighbor's products, which one plant could produce more economically than two.[26]

3. Dr Pepper and Royal Crown have stated in their annual reports that the trend toward consolidation will continue because of greater efficiencies in larger plants.[27]

4. A 1965 NSDA study reached similar conclusions and predicted a 40%–50% decline in the number of bottlers by 1970. That prediction overstated the decline that occurred, but not by much.[28] The study also stated that

> Many of today's franchise boundaries, while well-suited to earlier modes of transportation have become too small to allow individual bottlers to capitalize on established retail trading areas.[29]

In view of the above statements, by industry spokesmen including NSDA, it seems incongruous for NSDA to claim that the Commission's actions will cause consolidations among bottlers.

Bottlers have the ability to serve much wider areas than those to which they are currently restricted. This is due to the great changes in transportation and distribution systems which have taken place since the territorial boundaries were established. Ending these restrictions would allow small bottlers, now confronted with serving an uneconomically small territory, to serve the major metropolitan areas located within several hundred miles of their existing plants.

Soft drink firms not hampered by territorial restrictions serve larger areas in general than do the franchisees of the top eight syrup manufacturers. For example, Shasta has 13 distribution areas which roughly correspond to the major areas served by large food wholesalers and retailers. A similar pattern of plant location corresponding to the marketing areas of food wholesalers is found in Safeway's soft drink bottling operations and in such regional soft drink firms as Graf's in the Milwaukee area and Faygo in the Detroit area. These nonfranchised bottlers have found that transportation costs do not keep them from serving an area substantially larger than that served by the average franchised bottler. The irrationality of the present territories can be seen in the frequent instances in which a multibrand bottler has different territories for each brand he carries. For example, New York Seven-Up Bottling Co. distributes Seven-Up products in Bronx, Manhattan, Westchester, Orange, Rockland, Dutchess, and Putnam counties, and Royal Crown products in those counties, plus the counties of Nassau, Suffolk, Queens, Kings and Richmond.[30]

Typically, several small bottlers of the same brand operate near metropolitan areas. These small bottlers with territories too small to support an efficient plant do not have the option of expanding their marketing area in order to support a larger efficient plant. They have had essentially two choices: be acquired by, or acquire a nearby bottler. In most instances bottlers have chosen to be acquired, generally by a larger bottler.

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[25] *Soft Drinks*, January, 1968 at 38.

[26] *Soft Drinks Industry*, Feb. 13, 1970, at 17.

[27] Dr Pepper *Annual Reports*, 1963, at 3, 1970, at 16. Royal Crown Cola Co., *Annual Reports*, 1968 at 2, 1969 at 3.

[28] Corplan Associates of Illinois Institute of Technology, *A Study of the Soft Drink Industry 1965–1970*, 34 (1966).

[29] *Id.*, at 3.

[30] *Soft Drink Workers Union, Local 812*, 192 NLRB 139 (1971). (Slip opinion at pp. 4–5).

Small bottlers who have attempted to grow to efficient size have found themselves blocked by territorial restrictions. For instance, when Coca-Cola Bottling Co. of Taft, California (Taft) attempted to expand its sales by selling canned soft drinks, manufactured for it by The Coca-Cola Company, to a food broker who resold to customers in the territory of Coca-Cola Bottling Co. of Los Angeles, Coca-Cola refused to sell it sufficient canned products to supply its new customers. Ironically, Coke refused in spite of the fact that Los Angeles Coke was selling into Taft's territory.[31] Taft has sued The Coca-Cola Company under the antitrust laws for the lost sales caused by Coke's refusal to sell it canned soft drinks. Enactment of this legislation would prevent bottlers such as Taft from prevailing in private actions against their syrup manufacturers.

For Taft the ability to sell its products outside of its small territory had been an opportunity to survive. The Coca-Cola Company informed Taft by letter that it should sell its business since its assigned territory was too small to support an efficient plant. Other small Coke bottlers have had similar experiences with Los Angeles Coke, which continues to sell into the territories of these small bottlers. However, The Coca-Cola Company has restricted the sales of canned soft drinks to them in order to prevent them from selling into Los Angeles Coke's territories in spite of sales by Los Angeles Coke into their territories. This action underlines Coca-Cola's *bias* in favor of large bottlers.

In summary, territorial restrictions in the soft drink industry have actually contributed to the decline in the number of bottlers. Small bottlers have been denied the opportunity to continue in the industry by expanding their sales and growing to efficient size. Rather, they have been induced to *leave* the industry through merger. If the territorial restrictions are removed, small bottlers such as Taft will be given an opportunity to expand their operations to the point at which they can support an efficient plant. Mergers among small bottlers will not be opposed; nor would the establishment of joint production facilities by small bottlers.

Enactment of the proposed legislation may aid small bottlers seeking to sell their businesses to large bottlers; however, it will adversely affect those small businessmen who want to continue in the bottling business by confining their operations to uneconomically small areas.

VI

TERRITORIAL RESTRICTIONS HAVE PREVENTED BOTTLERS, RETAILERS AND CONSUMERS FROM OBTAINING THE COST SAVINGS THAT CENTRAL WAREHOUSING MAY OFFER

Ending territorial restrictions may lead to increased use of central warehousing of soft drink products by food wholesalers and retailers. We do not advocate its use or the use of any distribution method. All we advocate is that retailers, wholesalers and bottlers be permitted to decide which distribution system they prefer rather than having that decision made for them by the syrup manufacturers. To the extent that central warehousing offers any cost advantages, it benefits small and large bottlers and small and large retailers alike. A strong possibility exists that any cost savings will be passed on to consumers due to the competitive nature of retail food marketing.

A. Bottlers may lower their distribution costs by central warehousing

Central warehousing is a distribution system whereby soft drink products are delivered in bulk to a warehouse, belonging to either an independent food wholesaler, a cooperative retail organization or a retail chain, for redistribution to retail outlets. Although this is in contrast to the present store-to-store delivery method now used by bottlers of soft drinks, *almost all other nonperishable food products are distributed through central warehouses.*

For bottlers, central warehouse delivery may result in significant transportation cost savings since bulk deliveries to a single warehouse are more economical than multiple deliveries to individual outlets. By allowing significant cost reductions, it presents an opportunity for small bottlers to supply large metropolitan accounts which are currently foreclosed to them by territorial restrictions.

Where territorial restrictions have begun to crumble, bottlers ship much greater distances than bottlers who feel bound by their restrictions. In the Los

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[31] More ironic is that Los Angeles Coke had given Taft a commission on all sales it made into Taft's territory prior to the decision of the Supreme Court holding territorial restrictions *per se* illegal. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379. After *Schwinn*, Los Angeles Coke apparently felt that territorial restrictions were illegal and it was not necessary to pay Taft anything on sales into Taft's territory.

Angeles area, food wholesalers and retailers, tired of paying the high prices charged by Los Angeles bottlers, have purchased soft drink products from small bottlers located as far away as Denver, Colorado. Even including transportation costs, prices of the distant bottlers are as much as 12% cheaper than the prices of the Los Angeles bottlers.

The largest portion of soft drinks transportation costs consists of the costs of loading and unloading. Once loaded, a delivery truck can haul soft drinks several hundred miles almost as economically as a hundred miles. This factor has enabled bottlers in Las Vegas, 280 miles away, and in Denver, 1100 miles away, to serve accounts in the Los Angeles area. Furthermore, the possibility of backhauling can substantially reduce the cost of transporting soft drinks. For example, grocery wholesalers frequently pick up food products on the return trip to their metropolitan warehouses after their grocery deliveries have been made to their customers and their trucks are empty. On the return trip to the warehouse, any bottler's plant within the hundred mile radius normally covered by wholesalers is a possible pickup point. Thus, bottlers located far from metropolitan areas would have the ability to compete for metropolitan accounts in the absence of territorial restrictions. Indeed, soft drinks may be one of the few products manufactured in many small communities which would be available for backhauling into metropolitan areas.

The small California bottlers, some of whom are located 300 miles away from the Los Angeles market, have successfully increased their sales through backhauling. Small bottlers in other parts of the country have similar capabilities. Large chains and wholesalers have stated that they would purchase their soft drink requirements from whomever could offer the quantities they want at the lowest prices. The California bottlers have proved that small bottlers can meet these criteria.

Assertions that small bottlers cannot compete with large bottlers with respect to sale of soft drinks in non-returnable containers are contrary to the facts. About one-half of all packaged soft drinks are sold in non-returnable containers. One-third of all packaged soft drinks are sold in non-returnable glass containers,[32] which small bottlers can bottle themselves. Those bottlers unable to afford the heavy capital expenditures necessary to install a canning line can purchase canned soft drinks from contract canners, other bottlers and syrup manufacturers. In addition, many small bottlers have pooled their resources to create jointly-owned canning cooperatives.[33] In Southern California, small bottlers have successfully competed with large bottlers in selling canned soft drinks even though the canned products were not produced by them but were purchased from syrup manufacturers or contract canners.

In the absence of territorial restrictions, large grocery chains would *not* control the distribution of branded soft drink products. As demonstrated in Part II, soft drinks are one of the most heavily advertised and successfully differentiated consumer goods in the American economy. The strong brand loyalties and preferences that advertising has developed would insure the continued importance of branded soft drinks. In fact, lower prices might help branded soft drinks more effectively compete with private label soft drinks.

Contrary to NSDA's "Fact Sheet" large grocery chains do not distribute their private label soft drink brands as loss leaders. A NSDA sponsored study found that, even at lower prices, profit margins of 30% on private label soft drink brands were not unusual.[34] It noted that low advertising expenditures and lower delivery costs by central warehousing of private label brands contributed heavily to lowering overall costs.

B. Central Warehousing May Lower the Cost of Soft Drinks to Retailers

Ending territorial restrictions will enable all retailers, small and large, to take advantage of central warehouse facilities to purchase soft drinks at lower prices. Many wholesalers which serve small retailers state that their accounts want to receive soft drinks from them. Central warehouse operations can purchase soft drinks in truckload quantities thereby receiving quantity discounts. The cost of redistributing soft drinks to retail outlets is also lower because soft drink deliveries are made as part of regular grocery shipments, thereby spreading the delivery costs over a larger base and resulting in a lower per item transportation cost.

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[32] Compiled from Bureau of Census, *Current Industrial Reports*, Series M 34D, M 32G, M 34H.
[33] *Supra*, note 24 and accompanying text.
[34] Corplan, *supra*, note 28, at 31.

Small food retailers can receive these benefits to the same extent as can large retailers since all retailers receive their food products from central warehouse facilities, be they chain store distribution centers, cooperative warehouses, or ordinary wholesale operations. For example, Certified Grocers, Ltd., the largest retailer-owned cooperative in the country, currently sells Coca-Cola and Canada Dry products to its members at prices lower than those at which the members could purchase them individually.

Many small retailers belong to cooperatives such as Certified, which distribute food products to members on a non-profit basis. Other small retailers have affiliated themselves with independent wholesalers such as Independent Grocers of America, which typically price their goods on a cost-plus basis. Both types of organizations advertise for their members under the common names of their organizations and also provide management services to their members. In 1963, cooperative and voluntary wholesale organizations accounted for about 70% of the sales of all wholesale grocers.[35] Retailers not members of such organizations purchase their food products from general line wholesalers, some of whom sell on a cost-plus basis. If wholesalers purchase soft drinks at cost savings, these cost savings will be passed on to retailers since cooperatives are non-profit organizations and since many other wholesalers which serve small retailers sell on a cost-plus basis.

For small retailers there are other potential cost savings: To those very small retailers with wholesale purchases under the minimum required by some voluntary or cooperative wholesale organizations, the addition of a soft drink order might allow their participation in such organizations. Likewise addition of a soft drink order might entitle those retailers. already members of such organizations, to qualify for a better discount rate because of their larger purchases. Ordering from a central warehouse involves the following savings for retailers: fewer deliveries and thus fewer invoices to process; fewer interruptions; less likelihood of pilferage; and more time spent with customers. These are the same benefits which large retailers obtain from central warehousing. In summary, retailers receive most of their grocery products from central warehouses and many want to receive soft drinks in the same manner. Perhaps, retailers will determine that store door delivery better suits them, but this decision is one the marketplace should determine, not the syrup manufacturers.

C. Consumers Can Benefit from the Lower Prices Central Warehousing May Offer With No Diminution in Availability of Soft Drinks

If central warehousing results in lower wholesale prices, as appears likely, there is every reason to believe that savings will be passed on to consumers. The high degree of price competition prevalent at the retail grocery level in most markets should insure that retail prices will drop in response to lower wholesale prices. Therefore, consumers will be the ultimate beneficiaries of any cost advantages central warehousing may offer. However, regardless of whether central warehousing operations become common in the soft drink industry, increased intrabrand competition, as discussed in Part II will result in lower prices to consumers.

The elimination of territorial restrictions will not lead to reduced service to small volume retail accounts or to service at higher costs and prices than exists today. Even small food stores, as well as restaurants, taverns and similar retail establishments, have access to wholesale operations which can take advantage of central warehousing.

There is every indication that those retail outlets serviced by vending machines will continue to proliferate since vending appears to be profitable. Furthermore, in addition to bottlers. there are many independent vending companies which service these accounts. Increased competition among bottlers will lead to lower prices to vending companies which will enable them to maintain and expand the availability of vended soft drink products at lower prices than would otherwise prevail.

Illustrative of the advantages central warehousing may give to consumers is the experience of Soda Hut, the Boston area soft drink discount store, discussed previously in Part I. By purchasing truckload quantities of soft drinks from the nearby bottler offering the lowest price, Soda Hut is able to sell cases of 12 oz. cans of Coca-Cola and Pepsi-Cola at $2.99 a case as compared to the $3.60 a case price of local supermarkets. Since the bottlers selling to Soda Hut have been

[35] National Commission on Food Marketing, *Organization and Competition in Food Retailing, Technical Study No. 7,* 61 (1966).

violating the territorial restriction clauses in their contracts, its continued operation is problematic. Should territorial restrictions end, all retailers in the Boston area will be able to obtain the lower prices Soda Hut has and prices should fall throughout the Boston area.

THE PROPOSED LEGISLATION WILL ADVERSELY AFFECT ALL FOOD MANUFACTURING INDUSTRIES, NOT JUST THE SOFT DRINK INDUSTRY

The proposed legislation affects the entire $131 billion food manufacturing industry, as well as the five billion dollar soft drink industry. Section 3 of the proposed legislation would make lawful imposition of territorial restrictions in those situations where a trademark licensor licenses its trademark to a licensee who manufactures products under the licensor's trademark. Covered by this would be situations such as have existed in the bread industry. Recently, the Arnold Bakery Co. entered into a consent judgment with the Department of Justice in which it agreed to cease imposing territorial restrictions on its bakery licensees.[36]

The proposed legislation would also make lawful territorial restrictions where the licensee has the trademarked products manufactured for it by an "agent or subcontractor." The apparent purpose of this provision is to legalize territorial restrictions where bottlers obtain canned soft drinks from sources such as the syrup manufacturers, e.g., a Coke bottler's purchases from Canners for Coca-Cola, a subsidiary of The Coca-Cola Company. Insertion of the agency clause would permit other food manufacturers to enter into territorial restriction agreements with their wholesalers. For instance, cake mix manufacturers could lawfully enter into territorial restriction agreements with the wholesalers in which the cake mix manufacturers were designated as the wholesaler's manufacturing agent. Permitting food manufacturers to impose territorial restrictions on their distributors will cause higher prices in all food manufacturing in the same manner as territorial restrictions have caused higher prices in the soft drink industry.

CONCLUSION

On any given issue the stake of each member of the general public as taxpayer and consumer will be small, while that of the special interest group will be great. In this instance the general public's interest is diffused, being the overall maintenance of a free, competitive market and the resultant savings of a few cents on each national-brand-name bottle or can of soft drink consumed. As to the special interest group, the soft drink industry, this matter is of great economic significance, that is, being faced with intrabrand competition, where before, none whatsoever existed. No consumer will express his appreciation, or perhaps even be aware that he is the beneficiary of Commission action. The special interest seeking to avoid competition should not be permitted to triumph over the diffused general public interest. An adjudication concerning these territorial restrictions to determine what action, if any, would be in the public interest is now underway before the Commission. Without benefit of these hearings and the evidence of record being developed thereby, the proposed legislation would render moot the purpose of this adjudication and would make lawful that which the Commission has expressed reason to believe is unlawful.

Administrative agencies such as the Federal Trade Commission have been delegated by Congress the authority to function as an expert forum for determining the lawfulness of alleged unfair methods of competition. The proposed legislation would preempt this function. Commission action often challenges as unfair or anticompetitive that which a particular special interest group considers its key to "success." Albeit in the public interest, challenging such "success" renders such action particularly vulnerable to attack, as illustrated by this proposed legislation. We would urge that all to be considered with this proposed legislation is the trust and confidence in the Commission expressed by the statutory delegation of authority upon which rests its jurisdiction to deal with such matters. Indeed, the exercise of any legislative preemption as to this particular matter of concern to the soft drink industry could constitute an unfortunate precedent when the "success" of another broadly based special interest group is challenged by the Commission. Thus, passage of this bill will encourage defendants in future antitrust cases to seek similar Congressional intervention. In es-

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36 *United States* v. *Arnold Bakers, Inc.*, 1970 CCH Trade Cases ¶ 73,188 (E.D.Pa. 1970).

sence, we seek the opportunity to proceed with the adjudication now underway so that the Commission will have a full record of evidence upon which to make an appropriate disposition of this matter. If that disposition be deemed by the Congress to be wrong, a legislative remedy remains.

ALAN S. WARD,
Director, Bureau of Competition.
H. MICHAEL MANN,
Director, Bureau of Economics.

APPENDIX A

I

TERRITORIAL RESTRICTIONS CONSTITUTE A PER SE VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Territorial restrictions of the same nature as those challenged in the soft drink proceedings have been declared by the Supreme Court to be illegal *per se* under the antitrust laws. In *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967), a case which involved Schwinn's imposition of territorial restrictions on the distributors of its bicycles, the Court held

"Under the Sherman Act it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. White Motor [v. United States, 372 U.S. 253 (1963)]; Dr. Miles [Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)]. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale."

Recently, in an unanimous opinion the Supreme Court reaffirmed this doctrine in *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, —— U.S. —— (1972). In summary, the Supreme Court has held that once a manufacturer has sold its products, it cannot under the Sherman Act lawfully restrict the territories in which, or the persons to whom the products may be sold. Since violations of the Sherman Act are also violations of Section 5 of the Federal Trade Commission Act, (15 U.S.C. § 45), under the holding of *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 693 (1948), this doctrine applies to the Commission's soft drink proceedings which were brought under Section 5 of the Federal Trade Commission Act.

Several lower court decisions, with but one exception, have construed *Schwinn* to hold that territorial restrictions are *per se* illegal: *Janel Sales Corp.* v. *Lanvin Perfumes, Inc.*, 396 F. 2d 398, 406 (2d Cir. 1968); *cert. denied*, 393 U.S. 938 (1968); *Hensley Equipment Co.* v. *Esco Corp.*, 383 F. 2d 252, 263 (5th Cir. 1967); *Interphoto Corp.* v. *Minolta Corp.*, 295 F. Supp. 711, 720 (affirming the temporary restraining order requiring shipments of products outside of the area in which the dealer had been restricted), 417 F. 2d 621 (2d Cir. 1969); *Sherman* v. *Weber Dental Mfg.*, 285 F. Supp. 114, 116 (E.D. Pa. 1968); *Chapiewsky* v. *G. Heilman Brewing Co.*, 1969 Trade Cases ¶ 72, 712 (W.D. Wis. 1969); *Fagan* v. *Sunbeam Lighting Co., Inc., Eastern*, 303 F. Supp. 356, 361 (S.D. Ill. 1969); *United States* v. *Glaxo Group Ltd.*, 302 F. Supp. 1, 8–11 (D.D.C. 1969); (further proceeding) 5 CCH Trade Reg. Rep. ¶ 73, 190 (D.D.C. 1970).

The sole exception is *Tripoli Co.* v. *Wella Corp.*, 425 F. 2d 932 (3rd Cir. 1970), *cert. denied*, 400 U.S. 821 (1970), which concerned restrictions on the sale of products with potentially hazardous effects on consumers' health, to persons other than state-licensed barbers and beauticians. Clearly, there are no potentially hazardous products involved in these proceedings. Indeed, few food products exist which are less dangerous than soft drinks. Rather, involved here is a restriction on the area in which independent bottlers can resell their products. Moreover, *Tripoli* appears inconsistent with the holding in *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 450 (1940), which involved restrictions on the resale of a gasoline additive to particular purchasers. These restrictions were found by the Court to be unlawful.

II

TERRITORIAL RESTRICTIONS ARE PER SE ILLEGAL, WHETHER THE RESTRICTIONS APPLY TO FINISHED OR UNFINISHED PRODUCTS

The argument that *Schwinn* is inapplicable to soft drink bottling because *Schwinn* involved a finished product whereas the Commission proceedings involve

a semi-finished product which is manufactured for resale by bottlers is a distinction without legal or economic significance.

Indeed, the soft drink companies have gone far beyond what was attempted in *Schwinn* since they are attempting to restrict the transfer of a product manufactured from an ingredient they have already sold. Both the distributor in *Schwinn* and the bottler in the Commission proceedings are independent businessmen. Each sells a product that he has purchased—one sells the product in the form in which it was purchased, the other sells the purchased product after manufacturing it into a new form. From the viewpoint of the impact on competition, the effect of the territorial restrictions is identical in both instances—the elimination of intrabrand competition. As the Supreme Court held in *Schwinn*, territorial restrictions "are obviously destructive of competition. . . ." 388 U.S. at 379.

That the distinctions between finished and non-finished goods is of no legal significance is bolstered by *United States v. Glaxo Group, Ltd.*, 302 F. Supp. 1, 5 (D.D.C. 1969), a case which involved a restriction by a drug company on a licensee selling a drug in any form except individual dosage form. The stated purpose of this was to prevent bulk sales to companies who would themselves package the drugs in dosage form. In that case, the Antitrust Division moved for a partial summary judgment, arguing that the bulk sale restriction was *per se* illegal under *Schwinn*. The court found that whether the product is "finished would appear to be of little competitive, and of no legal, consequence: whether a sale is involved is, under *Schwinn*, the threshold question." 302 F. Supp. at 9 n 40. The ancillary restraint doctrine, in which the lawfulness of a restraint is tested by the reasonableness of the restraint as measured by the lawful main purpose, was as a result of *Schwinn*, held inapplicable to territorial restrictions. Hence, the bulk sale restriction was held a *per se* violation of Section 1 of the Sherman Act. A partial summary judgment was granted. 302 F. Supp. 1, 9–11 (D.D.C. 1969). Furthermore, in a related proceeding in the same case a different judge also held that the bulk sale restriction was a *per se* violation of Section 1 of the Sherman Act. 5 CCH Trade Reg. Rep. ¶ 73, 190 (D.D.C. 1970). Cf., *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 455–457 (1940).

Thus, the lower courts have interpreted *Schwinn* as holding that territorial restrictions constitute a *per se* violation of Section 1 of the Sherman Act. In addition, the holding in *Glaxo* demonstrates that the courts will not treat the sale of raw or unfinished materials any differently than the sale of manufactured products. Consequently, the fact that *Schwinn* involved a restriction on the sale of a finished product, *i.e.*, bicycles, and the soft drink cases involve the sale of an intermediate product, a concentrate which is processed into a finished product, *i.e.*, soft drinks, upon which the restriction is placed, does not affect the legal consequence. In both instances, such vertical restrictions are illegal *per se*.

III

TERRITORIAL RESTRICTIONS IN TRADEMARK LICENSING VIOLATE THE ANTITRUST LAWS

Trademark licensors cannot lawfully restrict the areas in which their trademark licensees can compete. Trademark licensors are not exempted from the antitrust laws and any territorial restrictions imposed under the guise of trademark law are unlawful. By permitting the use of a trademark by a "related company" the Lanham Act permits trademark licensing. 15 U.S.C. § 1055. The Lanham Act defines a related company as "any person who *legitimately* controls or is controlled . . . in respect ot the nature and quality of the goods and services upon which the mark is used." (Emphasis added.) 15 U.S.C. § 1127.

When the Lanham Act was being considered the Antitrust Division voiced objections to the bill on the ground that it would be used as a basis for violating the antitrust laws. *Phi Delta Theta Fraternity v. J. A. Buchroeder & Co.*, 251 F. Supp. 968, 977–78 (W.D. Mo. 1966), summarizes these objections. To insure that the antitrust laws were not contravened by the Act, Congress inserted the word "legitimate" in the section providing for trademark licensing and in the definition of related companies. Schniderman, *Trademark Licensing—a Saga of Fantasy and Fact*, 14 Law & Contemp. Prob. 248, 261 (1949). *The purpose of this was to indicate that trademarks could not be used to violate the antitrust laws.* In addition, defendants in trademark infringement suits were granted the affirmative defense "that the mark has been or is being used to violate the antitrust laws of the United States." 15 U.S.C. § 1115(b) (7).

In *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), cited with approval in *United States* v. *Sealy, Inc.*, 388 U.S. 350, 356 n. 3 (1967), the Supreme Court held that territorial restrictions in a trademark license are unlawful where the restrictions are accompanied by price-fixing. Subsequently, *Schwinn*, held vertical territorial restrictions without more *per se* illegal. This decision cannot be considered inapplicable here merely because *Schwinn* did not involve trademark licensing. That such is the law is established. The Supreme Court stated in *Timken:*

"A trademark merely affords protection to a name . . . A trademark cannot be legally used as a device for Sherman Act violation. Indeed, the Trademark Act of 1946 itself penalizes use of a mark 'to violate the antitrust laws of the United States'." 341 U.S. at 598–99.

Attempts to justify a territorial restriction system as a means of effectively monitoring the quality of a bottler's products are apparently based on the assumption that if several bottlers sold in the same area, the licensor would have difficulty in determining the source of defective products. In a monograph on the subject of territorial restrictions in trademark licensing, the author likened this contention "to cutting down an elm in which a cat has been treed in order to prevent the cat from falling and being hurt. The desired result may or may not be achieved and there are more direct and less drastic ways to achieve it." Dole, *Territorial Trademark Rights and the Antitrust Laws*, 132–33 (1965).

The licensor's quality control program should safeguard the quality of a licensed trademark or tradename product regardless of the number of licensees selling in a particular area. It is the quality control programs, which all syrup manufacturers maintain, not the territorial confinement of their bottlers which insures the quality of soft drinks. By simply marking the can, bottle or bottle crown with the identity of the producer, syrup manufacturers would be able to trace the identity of bottlers whose products are inferior and take whatever corrective action is necessary. Thus, syrup manufacturers can maintain their quality control programs without using territorial restrictions. Since high quality standards work to the benefit of both syrup manufacturers and their bottlers, no reason exists to fear diminished product quality if territorial restrictions are eliminated.

As demonstrated above, the protection of a trademark or tradename does not require the imposition of territorial restrictions on trademark licensees. Consequently territorial restrictions in bottling or any other form of trademark licensing do not pose any different problems than the typical supplier-dealer relationship in which territorial restrictions are present. In both instances the loss of intrabrand competition raises price levels thereby injuring the public. The elimination of intrabrand and competition has particularly serious anticompetitive effects where, as in this industry, interbrand competition has lost much of its effectiveness due to the strong preferences of consumers for specific soft drink brands. Thus, the *Schwin* doctrin is clearly applicable to trademark licensing in view of the *Timken* holding that trademarks cannot be legally used as a means of violating the antitrust laws. 341 U.S. at 598–99.

IV

NO INCONSISTENCY EXISTS BETWEEN VALID TRADEMARK LICENSING AND TRADEMARK LICENSEES OF THE SAME LICENSOR BEING FREE TO SELL IN EACH OTHER'S TERRITORIES

Competition between trademark licensees is not inconsistent with valid trademark licensing. *Huber Baking Co.* v. *Stroehmann Bros., Co.*, 252 F.2d 945, 956 (2d Cir. 1958) ; *cert. denied*, 358 U.S. 829 (1959). Three of the circuits have ruled on the question of whether a territorial restriction will be implied in a trademark license where one is not expressly stated. Two of the circuits have held that where the restriction is not expressly stated they will not imply it, *Parkway Baking Co.* v. *Freihofer Baking Co.*, 255 F.2d 641 (3rd Cir. 1958) ; *Pacific Supply Corp.* v. *Farmers Union Central Exch., Inc.*, 318 F.2d 894 (9th Cir. 1963) ; *cert. denied*, 375 U.S. 965 (1964), and one circuit has taken the opposite view in a case in which the evidence strongly supported a finding that a restriction had been intended by the parties. *Huber Baking Co.* v. *Strochmann Bros., Co.*, 252 F.2d 945 (2d Cir. 1958) ; *cert. denied*, 358 U.S. 829 (1958).

The courts have ordinarily been unwilling to imply a territorial restriction because they have found that the public would not be harmed since the products

sold by the licensees are manufactured according to the same specifications and with the same licensor monitoring their manufacturing processes. For example, *Parkway Baking Co. v. Freihofer Baking Co., supra*, concerned bakery licensees which had licenses to use the secret formula of the licensor, National, to bake and sell bread under a common trademark, Hollywood. Parkway, the licensee in Philadelphia, sold Hollywood bread to American Stores at American's warehouse and American delivered some of the bread to its stores in Allentown, the area of the Freihofer licensee. *Id.*, at 648–49. In dispute was the question of whether Parkway's sales violated its license. The court found that there was no confusion as to source since the source of origin was the licensor in both instances. In addition, the trial court noted that the products sold in both instances were practically identical, thus, implicitly finding that the trademark had fulfilled its function of being a quaranty of quality. 134 F. Supp. 823, 825–26 (E.D. Pa. 1957). Thus, the courts have found that the sale by more than one trademark licensee in an area is not unlawful under the trademark laws.

We can find no cases involving trademark licensing in which the courts have prohibited concurrent use by two users of the same trademarked products in the same geographical area on trademark grounds. Such cases as there are concern sales by unrelated companies of different products under the same or similar trademarks. The principle that different sales by different companies under the same trademark in the same area can be unfair competition and may harm the public since there is no quaranty that the products sold will be the same is not here challenged. Indeed, we agree with this principle. However, this principle is inaplicable to trademark licensing where, because of the quality control exercised by the licensor, the products sold by the different licensees are the same. The very essence of trademark licensing is the sale of uniform products sold by a number of licensees. Thus, the public can be assured that throughout the country their soft drinks will be the same no matter which licensee bottled the product. This is in accord with the shift in the function of trademarks from being an indication of source to being a guaranty of quality. 3 Callman, *Unfair Competition Trademarks and Monopolies* § 65.2.

THE 1920 LOWER COURT DECISION OF COCA-COLA BOTTLING CO. V. COCA-COLA CO., DID NOT UPHOLD TERRITORIAL RESTRICTIONS IN THE SOFT DRINK INDUSTRY

That the lawfulness of territorial restrictions in soft drink bottling trademark licenses has been upheld in *Coca-Cola Bottling Co.* v. *Coca-Cola Co.*, 269 Fed. 796, 814 (D.C. Del. 1920), constitutes an unwarranted contention. Territorial restrictions as to individual bottler licenses were not involved in this case. Rather, it concerned an agreement in which the bottling company was given the right to establish bottling plants or to have others who would follow Coca-Cola's quality control procedures establish plants in all but a few States in the United States. The bottling company agreed to purchase syrup from Coca-Cola and Coca-Cola agreed not to sell it to anyone in the area licensed to the bottling company. Subsequently, hundreds of independent subbottlers were established. Following a disagreement about the price of the syrup, Coca-Cola attempted to cancel the agreement and the bottling company sued to enjoin the cancellation. Coca-Cola argued that the territorial grant in the contract was an unlawful restraint of trade. In finding the contract lawful under the ancillary restraint doctrine, the court did not consider the territorial restrictions in the individual bottler contracts but only considered the agreement between Coca-Cola and the bottling company.

THE HOLDING IN DENNISON MATTRESS IS INAPPLICABLE TO THE SOFT DRINK PROCEEDINGS

A case relied upon to support the argument that the courts have upheld territorial restrictions in trademark licensing is *Dennison Mattress Company* v. *Spring-Air Company*, 308 F.2d 403 (5th Cir. 1962). *Dennison* involved a situation in which a number of mattress companies had banded together to organize a corporation in which each mattress company was a stockholder. The member companies followed uniform specifications for the mattress products sold under the common trademark and each member company sold its products in a specified territory. Dennison asserted as a defense to its contractual obligation to pay advertising assessments owning to the umbrella corporation, several antitrust defenses including an allegation of territorial restrictions. The Fifth Circuit affirmed the lower court's finding that the antitrust defenses did not relieve

Dennison of its contractual obligations. This result seems correct as the Supreme Court has repudiated antitrust defenses to contractual obligations unless enforcement of the contract would involve "one of the very restraints forbidden by the Sherman Act". *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959). The legality of the territorial restrictions and other antitrust arguments raised did not seem related to Dennison's liability for the advertising fees. However, we think deciding this case on the basis of a rule of reason approach was incorrect.

The Fifth Circuit's upholding of territorial restrictions was based upon its finding that the licensor had the affirmative duty to invoke quality control over its licensees noting that licensors which failed to impose such control could lose their trademark. The court seemed to link quality control with territorial restrictions without showing how territorial restrictions were necessary to assure appropriate quality control. The specification of product and production standards should have been sufficient to insure the necessary quality control. And as pointed out previously, territorial restrictions are a less direct and less certain method of assuring quality control than a quality control program. Thus, we assert that the rationale of *Dennison* is incorrect.

Spring-Air's victory was not a long-lasting one as some weeks after *Dennison* had been decided, Spring-Air entered into a consent agreement with the Antitrust Division in which it agreed to cease imposing territorial restrictions on its licensees. 1962 CCH Trade Cases ¶ 70,402 (N.D. Ill. 1962). Moreover, the Supreme Court has held territorial restrictions were illegal in two cases involving facts quite similar to *Dennison: Serta Associates, Inc.* v. *United States*, 393 U.S. 534 (1969) (*per curiam*) and *United States* v. *Sealy, Inc.* 388 U.S. 350 (1967). Thus, *Dennison* has, in effect, been overruled by the Supreme Court.

VII

TERRITORIAL RESTRICTIONS CONSTITUTE AN ILLEGAL HORIZONTAL MARKET DIVISION

In addition to the illegality of the vertical market division, an unlawful horizontal market division exists between those syrup manufacturers having wholly-owned bottling operations* and their bottlers which also is *per se* illegal. The market division allegation in these matters is based upon the fact that the independent bottlers, licensed by the syrup manufacturers, operating near areas in which the syrup manufacturers have wholly-owned bottling operations, are potential competitors of the syrup manufacturers' bottling operations. This potential competition is snuffed out by the territorial restriction provisions in the bottlers' contracts with the syrup manufacturers which prohibit their bottlers from selling outside their assigned territories. By agreeing that they will not compete outside of the territories allocated to them by the syrup manufacturers, the independent bottlers have contracted that they would not compete with the syrup manufacurers' wholly-owned bottling operations. Thus, the bottlers' contracts constitute a division of markets between competitors, *i.e.*, between the independent bottlers and the syrup manufacturers' wholly-owned bottling operations. In view of the substantial sales of soft drinks by the syrup manufacturers, these proceedings constitute significant market division cases, regardless of their not-to-be-slighted vertical aspects.

Market division agreements between competitors have been illegal *per se* since *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211 (1899). This principle was recently reaffirmed in *Burke* v. *Ford*, 389 U.S. 320 (1967). See, *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 138 (1964). The use of trademark licensing to divide markets by competitors been condemned by the Supreme Court as being illegal *per se* to the same extent as market division accomplished through other means. *Serta Associates, Inc.* v. *United States*, 393 U.S. 534 (1969), (*per curiam*); *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951).

The *Attorney General's Committee to Study the Antitrust Laws*, 26 (1955), has stated that agreements among competitors to divide markets have no purpose other than the elimination of competition. As the Supreme Court noted in *Burke* v. *Ford*, "When competition is reduced, prices increase and unit sales decrease." 389 U.S. 320, 322 (1967). Thus, the effect of market-allocation agreements is similar to price-fixing agreements in that both types of agreements adversely affect price and both are considered *per se* illegal under the antitrust laws.

*The Coca-Cola Co., PepsiCo Inc., Royal Crown Cola Co., Dr. Pepper Co., Cott Inc. and Canada Dry Corp. have wholly-owned bottling or canning operations. Seven-Up Co. and Crush International, Ltd. do not.

The recent decision of *United States* v. *Topco Associates, Inc.*, 1970 Trade Cases ¶ 73,388 (N.D. Ill. 1970), argued before the Supreme Court, 40 U.S.L.W. 3246, (November 23, 1971), raises the question of whether all horizontal market division agreements are *per se* illegal. *Topco* involved a member-owned marketing organization which is a common purchasing agent of private label food and non-food products for 25 medium-sized supermarkets. Challenged were the provisions of the membership agreements which specified the areas in which Topco members could sell Topco-label products. Also in contention were the provisions of the agreements which required members to obtain permission to expand the sales of Topco products into another member's territory. The court held that the *per se* illegality of market division agreements did not apply to this arrangement and applied a rule of reason approach to it. It held that the territorial restrictions enabled Topco members "to compete more effectively with national chains whose private label brands are sold exclusively through their own outlets," *Id.*, at ¶ 89,562, and were therefore lawful. Oral argument in *Topco* was held before the Supreme Court on November 16, 1971, at which time the solicitor General urged that the restrictions be held *per se* illegal. 40 U.S.L.W. 3245 (November 23, 1971).

However, even if the lower court's decision in *Topco* is affirmed by the Supreme Court, it would not affect this proceeding. The rationale of the lower court's opinion in *Topco* is that restrictions imposed by medium-sized firms are lawful as they permit these firms to compete more effectively with large national firms. As is apparent, the facts in these soft drink proceedings are significantly different from those in *Topco*. These proceedings involve the largest firms in the soft drink industry. Thus, even if *Topco* is not reversed by the Supreme Court, its holding would be inapplicable to this proceeding.

Respondents assert that the territorial restriction system is an effective method of marketing their products. A similar argument was made in *Schwinn*. In rejecting this argument and instead finding illegal *per se* Schwinn's restrictions on the areas in which its retailers and wholesalers could sell, the Court observed

"But this argument, appealing as it is, is not enough to avoid the Sherman Act proscription, because in a sense, every restrictive practice is designed to augment the profit and competitive position of its participants. Price fixing does so, for example, and so may *well-calculated division of territories*." (388 U.S. at 375). (Emphasis added.)

A similar argument of justification was rejected in *United States* v. *Masonite*, 316 U.S. 265 (1942). Although this was a price-fixing case, the *Attorney General's Committee to Study the Antitrust Laws*, discussed *supra*, points out the similarity of the two practices. The court in *Masonite* stated

"Since there was price-fixing, the fact that there were business reasons which made the arrangements desirable to the appellees, the fact that the effect of the combination may have been to increase the distribution of hardboard, without increase of price to the consumer, or even to promote competition between dealers, or the fact that from other points of view the arrangements might be deemed to have desirable consequences would be no more a legal justification for price-fixing than were the 'competitive evils' in the *Socony-Vacuum* case." (316 U.S. at 276).

Parties to market division agreements have also argued that such an agreement is necessary to protect the members of the agreement from ruinous competition. In 1898, this argument was first rejected in *Addyston Pipe & Steel*, 85 Fed. 271, 219 (1898), *aff'd.*, 175 U.S. 211 (1899). There the court held that

"* * * however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, [the agreement] was void at common law * * *"

Thus, the Court has emphasized that with respect to vertical territorial restrictions and horizontal market division, the only relevant consideration in determining their lawfulness is to ascertain whether the restrictions exist. If they do exist, then they are declared unlawful without any inquiry into their competitive effect.

VIII

TERRITORIAL RESTRICTIONS AGREEMENTS ARE DISTINGUISHABLE FROM LAWFUL EXCLUSIVE SALES REPRESENTATION AGREEMENTS

These proceedings are not an attack upon exclusive sales representation. In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court carefully distinguished between situations in which distributors were prohibited from

selling outside of an area assigned to them and situations where a manufacturer selects certain customers and agrees to sell to them alone. The Court stated in referring to the latter situation, "[I]f nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers . . . the restriction, on these facts alone, would not violate the Sherman Act." *Id.*, at 376. Immediately prior to this passage the Court cited *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), which makes it apparent that it was doing nothing more than recognizing the existence of the *Colgate* doctrine.

Uncontested is the propriety of a manufacturer having an exclusive representation system by which it establishes a dealer in a particular territory and promises to sell to no other dealers within that particular territory. Such is manifestly not the situation confronted in these matters. These proceedings concern a territorial restriction system in which bottlers are *forbidden* to sell outside of their designated territory, not an exclusive representation system in which distributors are *free* to sell where and to whom they please.

That territorial restriction systems are treated differently from exclusive representation systems can be illustrated by two cases. Interestingly, these cases are frequently cited for the proposition that territorial restrictions are, in fact, only exclusive representation cases. *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D.C. Cir. 1957), involved a situation in which the largest Packard dealer in Baltimore, Maryland was losing money. The dealer requested that Packard terminate the other two Packard dealers in Baltimore. Packard agreed to do so and in the resulting suit brought by one of the terminated Packard dealers, the Court held that the terminaiton was lawful. The other case, *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F. Supp. (D. MD. 1956), *aff'd., per curiam*, 239 F. 2d 176 (4th Cir. 1956), involved similar facts. In discussing these cases, the Court, in *White Motor Co.* v. *United States*, 372 U.S. 262, 270 n. 8, (1963), stated that the doctrine of these cases was of limited scope since the manufacturers involved were much smaller than the "Big Three" automobile manufacturers and had suffered losses in their respective market shares. In conclusion, the Supreme Court noted that, ". . . *the exclusive franchises involved in these cases apparently were not accompanied by territorial restrictions.*" (Emphasis added.)

The Commission itself has distinguished the two systems. *Snap-On Tools Corp.*, a territorial restriction case, rejected respondent's argument that *Schwing* and *Packard* were controlling on the question of the lawfulness of its territorial restriction agreements. In finding the restrictions illegal, the Commission held, "the cases relied upon by respondent are of little aid here. *Schwing Motor Car Co.* v. *Hudson Sales Corp.* [citation omitted], and *Packard Motor Car Co.* v. *Webster Motor Car Co.* [citation omitted], involved the entirely different situation of exclusive franchises where the manufacturer agreed to sell to no other dealer in a designated area. No restraint upon the dealer was involved." 59 F.T.C. 1035, 1048 (1961), *rev'd.*, 321 F. 2d 825 (7th Cir. 1963), *rev'd.*, in effect, by *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Recently, in *Glaxo, supra*, the court clearly distinguished between exclusive representation and territorial restrictions. Its final order permitted defendants to grant exclusive distributorships but enjoined defendants

"From entering into, adhering to, maintaining or claiming any rights under any agreement or understanding with any of its licensees under any United States patent relating to drugs, which prevents, restrains or limits any party thereto from selling any drug in bulk form, or otherwise prevents, restrains or limits *any party thereto in its free choice of customers or persons with whom it chooses to deal.*" (Emphasis added.)

In clarifying that provision of its Final Judgment, the court declared that the injunction

". . . is not to be construed to prevent defendent from granting exclusive licenses or exclusive distributorships or to grant licenses limited to particular fields of use under any United States patent relating to drugs." *United States* v. *Glaxo Group Limited*, USDC, Civil Action No. 558-68, dated August 12, 1971.

Thus, it would be disingenuous to cloth a territorial system in the garb of an exclusive representation system for the courts and the Commission have treated them differently, finding territorial restrictions illegal and exclusive representation systems legal.

APPENDIX B

DOMINANCE OF SOFT DRINK BOTTLING BY LARGE PLANTS—GROWTH PATTERNS FOR 1967–71.

Plant size by annual volumes sales	1967 [1] Number of plants	1967 [1] Percent of total sales	1968 [2] Number of plants	1968 [2] Percent of total sales	1969 [3] Number of plants	1969 [3] Percent of total sales	1970 [4] Number of plants	1970 [4] Percent of total sales	1971 [5] Number of plants	1971 [5] Percent of total sales
Over $2,000,000	161	52.1	173	54.0	228	61.7	446	64.3	463	68.9
$1,000,000 to $2,000,000	289	16.0	289	14.6	309	12.9	230	10.0	230	8.8
$500,000 to $1,000,000	537	15.0	548	13.8	494	10.3	579	12.5	563	10.8
$300,000 to $500,000	549	9.4	596	7.9	566	5.9	533	5.7	496	4.8
$100,000 to $300,000	1,252	5.4	1,107	6.4	996	6.2	827	5.3	767	4.4
Under $100,000	763	2.1	701	1.7	601	1.3	416	1.0	396	.8
Unclassified Volume	99		87		75		75		75	
Total	3,650		3,501		3,269		3,106		2,990	

[1] Soft Drinks, January 1968, 24.
[2] Soft Drinks, January 1969, 35.
[3] Soft Drinks, January 1970, 23.
[4] Soft Drinks, January 1971, 35.
[5] Soft Drinks, January 1972, 23.

Appendix C

LIST AND DESCRIPTION OF CONGLOMERATE FIRMS WITH SOFT DRINK BOTTLING OPERATIONS AND OF LARGE MULTIPLANT BOTTLERS

Conglomerates

(1) Westinghouse Electric Corporation—In 1970, this company's total sales were $4.3 billion and it ranked 13th in the *Fortune 500* listing of the largest industrial corporations. It is now the largest bottler of 7-Up products, holding the territory of almost all of Southern California and the State of Indiana, an area having a 1970 population of 15.9 million people.

(2) Beatrice Foods Company—In 1970, this company's total sales were $1.8 billion and it ranked 70th in the *Fortune 500* listing of the largest industrial corporations. It is now the largest Royal Crown bottler. It serves Southern California, Minneapolis-St. Paul, Minnesota and Louisville, Kentucky.

(3) Illinois Central Industries, Inc.—In 1970, this company's total sales were $754 million and it ranked 161st in the *Fortune 500* listing of the largest industrial corporations. It is now the largest franchise for Pepsi Co products, serving large sections of Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana and Missouri. In 1970, these were 14.4 million people in the Pepsi territories held by Illinois Central Industries, Inc. Furthermore, this firm is a substantial 7-Up and Dr Pepper bottler.

(4) General Tire and Rubber Company—In 1970, this company's total sales were $981 million and it ranked 125th in the *Fortune 500* listing of the largest industrial corporations. Through its RKO General operation, it is a leading PepsiCo bottler, serving parts of Arkansas, Indiana, Ohio and Tennessee, which, in 1970, had a total population of 2.4 million. In addition, it bottles both 7-Up and Dr Pepper.

(5) Borden, Inc.—In 1970, this company's total sales were $1.8 billion and it ranked 54th in the *Fortune 500* listing of the largest industrial corporations. It is a leading PepsiCo and Dr Pepper bottler, serving the area around Indianapolis, Indiana.

(6) Wometco Enterprises—In 1970, this company's total sales were $97 million. It is a leading Coke bottler serving such widespread areas as Norfolk, Virginia; Plattsburgh, New York; Nashville, Tennessee; and the Grand Canyon, Arizona. The 1970 population of its Coke territories was 2.1 million.

(7) General Cinema Corporation—In 1970, this company's total sales were $159 million. It is a leading bottler of both PepsiCo and 7-Up, serving substantial areas of Florida, Georgia, Indiana, Ohio, Virginia and West Virginia. The 1970 populaton of its Pepsi territories was 10.4 mllion and of ts 7-Up territories, 3.8 million.

LARGE MULTIPLANT BOTTLERS

Coke franchisees

(1) The Coca-Cola Bottling Company of New York, Inc.—In 1970, this company's total sales were $101.0 million, and its net return on equity was 17.9%. The company serves the entire New York metropolitan area, plus part of Upstate

New York, with Coke and Dr Pepper products. The 1970 population of the area which it served was 21.1 million.

(2) Coca-Cola Bottling Company of Los Angeles—In 1970, this company's total sales were $92.8 million and its net return on equity was 14.4%. The company serves all of greater Los Angeles with products of Coke and Canada Dry and bottled Coke, Crush and Dr Pepper in Las Vegas. The 1970 population of the area which it serves was 11.3 million.

(3) Associated Coca-Cola Bottling Co., Inc.—In 1970, this company's total sales were $89.3 million and its net return on equity was 11.2%. The company serves Upstate New York, Philadelphia, lower New Jersey, Terre Haute, Indiana, and most of Florida with Coke products, and Upstate New York with Dr Pepper. The 1970 population of the company's Coke territories was 12.2 million.

(4) Houston Coca-Cola Bottling Co.—The president of this company serves as president of a number of other large Coca-Cola bottlers, including Dallas, Texas; Phoenix, Arizona; Denver, Colorado; Cedar Rapids, Iowa; and Peoria, Illinois. The 1970 population of these territories was 7.2 million. Each of these bottlers is privately held and, hence, no financial data are available.

(5) James E. Crass Coca-Cola Bottling Plants, Inc.—This firm sells Coke products in parts of Virginia, Maryland, the District of Columbia, Pennsylvania and Ohio, an area whose 1970 population was 5.3 million. It is privately held and, hence, no financial data are available.

(6) The Atlanta Coca-Cola Bottling Company—This firm sells Coke products in an area surrounding Atlanta, Georgia, which area had a 1970 population of 3.9 million. It is privately held and, hence, no financial data are available.

(7) Coca-Cola Bottling Corporation—In 1970, this firm had total sales of approximately $17 million. Information concerning its net return on equity is not publicly available. The firm sells Coke products in parts of Indiana, Kentucky and Ohio, which areas had a 1970 population of 3.7 million.

(8) Coca-Cola Bottling Company of Miami, Inc.—In 1970, this firm had total sales of $23.4 million and its net return on equity was 19.9%. Although primarily located in Southern Florida, this firm also bottles in Maryland and Arkansas. The 1970 population of the territories it serves was 2.8 million.

(9) Coca-Cola Bottling Co. of the Midwest—In 1970, this company's total sales were $21.5 million and its net return on equity was 15.5%. The company serves directly or indirectly most of Minnesota and parts of North Dakota and Wisconsin, an area which, in 1970, had a population of 3.5 million.

(10) Coca-Cola Bottling Co. of Mid-America, Inc.—In 1970, this company's total sales were $14.3 million and its net return on equity was 12.6%. The company serves an area surrounding Kansas City in both Kansas and Missouri. In 1970, the population of the area served was 2.1 million.

(11) Detroit Coca-Cola Bottling Co., a subsidiary of the Stroh Brewing Co.—This firm serves the Detroit metropolitan area, an area whose 1970 population was 2.5 million. The company is privately held and, hence, no financial data are available.

(12) Coca-Cola Bottling Company, Richmond, Virginia. This firm operates plants in Maryland, Ohio, Pennsylvania, West Virginia and Virginia. The 1970 population of the area it serves was 1.9 million. The company is privately held and, hence, no financial data are available.

(13) Coca-Cola Bottling Co., Indianapolis, Indiana—This firm serves much of the State of Indiana. In 1970, the population of its territories was 1.9 million. The company is privately held and, hence, no financial data are available.

(14) St. Louis Coca-Cola Bottling Co., a subsidiary of Fred Morton Corporation—Prior to 1971, this bottler, serving the greater St. Louis market, was owned by Associated Coca-Cola. Its 1970 sales were approximately $10 million. For a number of years, it had suffered losses, primarily due to a poor plant location. In 1971, Fred Morton Corporation purchased this bottler from Associated Coca-Cola. The population of its territory was 1.8 million.

(15) Coca-Cola Bottling Co. of San Antonio. This firm is one of several controlled by the Biedenharn family. Other such bottlers aer located in Shreveport, Louisiana and Temple, Texarkana, Uvalde and Wichita Falls, Texas. The total 1970 population of these territories is 1.8 million. In 1971, the Biedenharn family sold their interest in the Coca-Cola bottler of the Grand Canyon, Arizona to Wometco. Each of these plants is privately held and, hence, no financial data are available.

(16) Coca-Cola Bottling Co. of Ft. Worth—This is one of nine Texs bottlers of Coca-Cola who share a common president. The total 1970 population of these 9 territories is 1.7 million. Each of these plants is privately held and, hence, not financial data are available.

(17) The Louisiana Coca-Cola Bottling Co., Ltd.—This bottler serves the greater New Orleans metropolitan area, an area whose 1970 population was 1.5 million. The firm is privately held and, hence, no financial data are available.

(18) The Coca-Cola Bottling Co. of San Diego—This bottler serves the southern-most counites in California, an area whose 1970 population was 1.4 million. It is privately held and, hence, no financial data are available.

(19) The Coca-Cola Bottling Co. of Memphis, Tennessee—This firm serves parts of Tennessee, Mississippi and Arkansas. The 1970 population of its territories was 1.2 million. It is privately held and, hence, no financial data are available.

Pepsi Franchises

(1) Rheingold Corporation—In 1970, this company's total sales were $220.8 million, of which 30% represented soft drinks. In addition to several foreign bottling territories, Rheingold holds Pepsi franchises for most of Southern California and Central Florida and Dr Pepper and 7-Up franchises for Central Florida. The 1970 population of the area currently served by Rheingold was 10.7 million.

(2) Allegheny Beverage Corporation—In 1970, this company's total sales were $51.5 million and its net return on equity was 7.9%. The company bottles Pepsi, Royal Crown, Crush and other products and operates in Virginia, Maryland and Pennsylvania. The 1970 population of the areas it serves was 5.0 million.

(3) MEI Corporation—Through recent acquisitions, this firm has become a significant bottler of Pepsi products. The 1970 population of the territories which it serves was 4.4 million.

(4) Pepcom Industries, Inc.—In 1970, this company had total sales of $16.5 million and a net return on equity of 30.4%. It holds Pepsi franchises for Long Island and parts of North Carolina. In 1970, the population of its territories was 3.6 million.

(5) Pepsi-Cola Bottling Co. of Washington, D.C., Inc.—In 1970, this company had total sales of $16.5 million and a net return on equity of 15.8%. It bottles PepsiCo products in the Washington, D.C. metropolitan area which, in 1970, had a population of 2.8 million.

(6) American Pepsi-Cola Bottlers, Inc.—This company operates bottling plants in Sacramento, California; Springfield, Ohio; and Charlotte, Greensboro, and Winston-Salem, North Carolina. In addition to bottling Pepsi products, it also bottles products of the 7-Up and Dr Pepper companies. Its 1971 net sales from bottling operations were $21.2 million. The 1970 population of the areas currently served by this company was 1.1 million.

7-Up Franchises

(1) Joliet 7-Up Bottling Company—This firm is privately held and, hence, no financial data are available. It holds the 7-Up territory for Northern Illinois, part of Wisconsin, New York City and Washington, D.C. The 1970 population of these areas was 15.5 million.

(2) Joyce Products Company—This firm has the 7-Up territories for almost all of Ohio and the Detroit metropolitan area, which areas had a 1970 population of 14.9 million. It is privately held and, hence, no financial data are available.

(3) The 7-Up Company of Philadelphia—This firm has the 7-Up territory for the entire Baltimore-Wilmington-Philadelphia area which had a 1970 population of 9.2 million. It is privately held and, hence, no financial data are available.

(4) JFW Enterprises—The firm serves much of Minnesota, part of Wisconsin and the Houston, Texas Metropolitan Area, which areas had a 1970 population of 4.1 million. It is private held and, hence, no financial data are available.

(5) The 7-Up Bottling Co. of St. Louis—This firm holds the 7-Up franchise for Eastern Missouri and Southern Illinois. These areas had a 1970 population of 3.9 million. The company is privately held and, hence, no financial data are available.

(6) Midroc—This firm holds the 7–Up and Dr Pepper franchises for much of Georgia and parts of Alabama. These areas had a 1970 population of 3.2 million. The company is privately held and, hence, no financial data are available.

(7) Mid-Continent Industries—In 1970, this company had total sales of $21 million and a net return on equity of 12.6%. It bottles 7-Up, Dr Pepper, Crush and Royal Crown. Its territories include most of Iowa and part of Nebraska.

(8) The 7-Up Company of Kansas City, Missouri—This firm has the 7-Up territory for much of Western Missouri and Eastern Kansas, an area whose 1970 population was 2.3 million. It is privately held and, hence, no financial data are available.

APPENDIX D

AREAS OF THE COUNTRY SERVED BY THE 21 LARGEST COCA-COLA BOTTLERS

Company	1970 Population	Percent of United States
1. The Coca-Cola Co	28,059,793	13.81
2. The Coca-Cola Bottling Co. of New York, Inc	21,032,460	10.37
3. Associated Coca-Cola Co., Inc	12,203,103	6.00
4. Coca-Cola Bottling Co. of Los Angeles	11,256,398	5.54
5. Houston Coca-Cola Bottling Co	7,246,468	3.57
6. James E. Crass Coca-Cola Bottling Plants, Inc	5,306,326	2.61
7. The Atlanta Coca-Cola Bottling Co	3,892,458	1.92
8. Coca-Cola Bottling Corp., Cincinnati, Ohio	3,728,577	1.83
9. Coca-Cola Co. of Miami, Inc	2,839,075	1.40
10. Coca-Cola Bottling Midwest, Inc	2,536,780	1.25
11. Detroit Coca-Cola Bottling Co. (subsidiary of Stroh Brewing Co.)	2,517,917	1.24
12. Wometco Enterprises, Inc	2,155,909	1.06
13. Coca-Cola Bottling Co. of Mid-America, Inc	2,110,882	1.04
14. Coca-Cola Bottling Co., Richmond, Va	1,929,557	.95
15. Coca-Cola Bottling Co., Indianapolis, Inc	1,878,691	.92
16. St. Louis Coca-Cola Bottling Co. (subsidiary of Fred Morton Corp.)	1,820,777	.90
17. Coca-Cola Bottling Co. of San Antonio	1,815,898	.89
18. Coca-Cola Bottling Co. of Fort Worth	1,671,283	.82
19. The Louisiana Coca-Cola Bottling Co., Ltd	1,530,414	.75
20. Coca-Cola Bottling Co. of San Diego	1,432,446	.70
21. The Coca-Cola Bottling Co. of Memphis, Tenn	1,221,221	.60
Total (population of areas served)	118,236,433	[1] 58.18
Population of total United States	203,235,298	

[1] Column does not add to total due to rounding of figures.

Source: 1970 Census of population and territories of bottlers.

AREAS OF THE COUNTRY SERVED BY THE 10 LARGEST PEPSI-COLA BOTTLERS

Company	1970 population	Percent of United States
1. PepsiCo, Inc	37,524,621	18.46
2. Pepsi-Cola General Bottlers, Inc	14,373,219	7.07
3. Rheingold Corp	10,717,867	5.27
4. General Cinema Corp	10,375,627	5.11
5. Allegheny Beverage Corp	5,031,511	2.48
6. MEI Corp	4,431,131	2.18
7. Pepcom Industries, Inc	3,638,957	1.79
8. Pepsi-Cola Bottling Co. of Washington, D.C., Inc	2,835,713	1.40
9. RKO General, Inc	2,369,556	1.17
10. American Pepsi-Cola Bottlers, Inc. (formerly All-American Beverages, Inc.)	1,095,688	.54
Total (population of areas served)	92,393,890	[1] 45.46
Population of total United States	203,235,298	

[1] Column does not add to total due to rounding of figures.

Source: 1970 Census of population and territories of bottlers.

AREAS OF THE COUNTRY SERVED BY THE 11 LARGEST 7-UP BOTTLERS

Company	1970 population	Percent of United States
1. Westinghouse Electric Corp	15,936,749	7.84
2. Joliet 7-Up Bottling Co	15,502,593	7.63
3. The Joyce Products Co	14,862,033	7.31
4. 7-Up Bottling Co. of Philadelphia	9,241,363	4.55
5. JFW Enterprises, Inc	4,085,740	2.01
6. 7-Up Bottling of St. Louis	3,921,840	1.93
7. General Cinema Corp	3,807,477	1.87
8. Midrock Corp.—Beverage Division	3,167,416	1,56
9. Mid-Continent Industries, Inc	2,634,541	1.30
10. 7-Up Co. of Kansas City, Mo	2,289,669	1.13
11. Pepsi-Cola General Bottlers, Inc	1,422,308	.70
Total (population of areas served)	76,871,729	[1] 37.82
Population of total United States	203,235,298	

[1] Column does not add to total due to rounding of figures.

Source: 1970 Census of population and territories of bottlers.

Statement of the National Soft Drink Association

The Soft Drink Industry

AN ECONOMIC AND LEGAL ANALYSIS

Preface

This document was occasioned by the joint statement of the Bureaus of Competition and Economics of the Federal Trade Commission, dated March 31, 1972, submitted in opposition to S. 3040, H.R. 12261, and similar legislative proposals. This statement has been widely circulated among members of Congress by the FTC staff.

The statement by the staff of the FTC presents a superficially appealing, but distorted, view of the soft drink industry and the effectiveness of competition therein. The staff's statement is loosely structured around a series of highly controverted claims; the reader is never made aware of the complete economic picture of the soft drink industry and, hence, is unable to fully and completely evaluate the merits, if any, of the FTC's economic position.

To provide the reader with an understanding of the industry from which he may better judge the merits of competing economic claims, this presentation begins with a general review of the history, structure, and operational background of industry practice. Within this framework, statements by both the FTC staff and the industry may more rationally be judged. Following this background material, there is presented in logical sequence a rebuttal of the specific arguments of the Commission's staff, both economic and legal. Subheading references keyed to the FTC's statement have been inserted to aid the reader in his analysis.

ECONOMIC ANALYSIS

OVERVIEW OF THE COMPETITIVE DYNAMICS OF THE SOFT DRINK INDUSTRY

A. The Current Structure of the Soft Drink Industry

The soft drink industry is divided into essentially three segments—(1) nationally franchised soft drink brands, (2) local and regional brands, and (3) controlled label soft drinks.

1. *Nationally Franchised Soft Drink Brands.*—The bottling of flavored soft drinks began in the United States in the latter half of the nineteenth century. Prior to that time, syrup had been used almost exclusively as a base for soft drinks served at soda fountains for immediate consumption. During this period, a growing number of extract or syrup manufacturers were attracted into the industry. These companies developed and introduced many new proprietary flavors, including Hires, Vernor's, Clicquot Club, Dr. Pepper, Coca-Cola, and Pepsi-Cola. Among the new flavors was the soon-to-be-popular cola—a sophisticated drink composed of many ingredients difficult to analyze and duplicate.

Many of these proprietary companies soon began to franchise the right to bottle their common law trademarked products. In 1899, shortly after the Sherman Act (15 U.S.C. §§ 1, 2) was enacted, The Coca-Cola Company granted an exclusive trademark license to J. B. Whitehead and B. F. Thomas to produce and sell bottled Coca-Cola in most states. Whitehead and Thomas were to be both processors and sellers of bottled Coca-Cola, manufactured from Coca-Cola syrup under the trademark license, rather than mere distributors of a finished product. Ancillary to the trademark licensing agreement, Coca-Cola specified an exclusive geographic territory in which only Whitehead and Thomas could vend bottled soft drinks under the Coca-Cola trademark. Because of the size of the territory, the company created by Whitehead and Thomas in turn franchised hundreds of independent local bottlers to produce and sell bottled Coca-Cola in exclusive geographic territories within that part of the country covered by the Whitehead and Thomas license. Pepsi-Cola (1908), Dr. Pepper (1926), and other proprietary syrup companies soon followed Coca-Cola in franchising independent bottlers to produce and vend their respective trademarked soft drinks in exclusive geographic territories. In the economic milieu of the period, such ancillary territorial restraints were deemed essential by entrepreneurs in the infant soft drink industry trying to develop a nationwide system for manufacturing and marketing their packaged products.

Around the turn of the century, soft drink companies were largely small operations, typically owned by founding pharmacists or their families. No company or group of companies dominated the industry. Almost all popular brands were local or regional. Advertising in national magazines was in its infancy. Commercial radio was non-existent and television was not even a dream. Motor trucks were just beginning to compete with horse-drawn delivery wagons, and machine-made bottles were just starting to replace their hand-blown counterparts. The highway system as we know it today did not exist. The supermarket was not even a concept. If local producers of soft drink syrups were to have their trademarked products bottled and distributed on a regional or nationwide basis, the only recourse was to induce local indepedent businessmen to provide the capital required to finance the venture. Not only did trademark owners need local businessmen to build plants and purchase equipment and bottling supplies, they needed their good will in the community to establish a demand for and promote the new national soft drink brands as they attempted to enter foreign markets and compete with established local products. In order to provide the necessary inducement for local entrepreneurs to supply the capital required and make the necessary effort to promote consumer acceptance of new soft drink products, soft drink franchisors included exclusive territorial provisions in trademark licenses. Moreover, such territorial restrictions encouraged greater development of promotional efforts since exclusive licensees knew that neither their licensors nor other licensees could obtain a "free ride" on their efforts; made possible the licensor's maintenance of quality control, thereby insuring uniform application of his common law trademark; facilitated the franchisor's production planning by enabling greater accuracy in calculating the forthcoming demand for syrup in a territory; reduced the selling cost of the product by avoiding duplication of sales effort in a territory; and encouraged the franchised bottler to develop the potential of his territory to the fullest, thereby maximizing sales of the franchised product.

Economically speaking, the soft drink territorial franchise allowed one of America's infant industries to grow up. The insurance provided licensees by territorial franchises enabled new brands of soft drinks to be produced and marketed in even the most distant and least populated areas of the country. In the ensuing decades, the territorial franchise system has been widely employed throughout the soft drink industry. It is used not only by the eight franchise companies named in the FTC complaints,[1] but by many other smaller companies as well. In just three quarters of a century, the concept of the territorial franchise has been employed to such an extent that today there are over fifty syrup companies who have franichsed local bottlers, thirty-six of them nationwide. These companies market well over 150 different soft drink brands through the vehicle of 8,100 franchise agreements with local bottlers.[2] The result is a "partnership" or "joint venture" between national firms and local businesses relatively unique in today's industrial climate.

The franchise company manufactures and sells syrups or flavoring concentrates to the bottlers. Franchise companies also underwrite most of the advertising and promotion expenditures made in connection with their trademarked products, provide advice and technical assistance on production, quality control, management and sales problems, and engage in development and test marketing of new products and containers.[3]

The bottlers are the manufacturers and distributors of packaged soft drinks produced from the franchisor's syrup or concentrate and manufactured according to his quality standards and specifications. The franchised bottler decides on the plant and equipment to be used, the volume of production by size and type of container and product mix, as well as the price to be charged and the manner in which he can maximize his market penetration and secure the widest possible distribution of soft drinks throughout his territory.[4]

Through this territorial franchise system, interbrand competition has become an inherent and vigorous part of the soft drink industry.

2. *Local and Regional Brands.*—A second element in the competitive equation in most local markets is the independent producer who manufactures and sells

[1] The Coca-Cola Co., Pepsico, Inc., The Seven-Up Co., Dr. Pepper Co., Canada Dry Corp., The Royal Crown Cola Co., Beverages International, and Cott Corp. (FTC Dockets 8853–59, 8878).

[2] Cresap, McCormick, and Paget, Inc., *A Study of the Soft Drink Bottling and Canning Industry and the Impact of the FTC Complaint on the Industry's Future* (1972), p. 13 (hereinafter "CMP Study").

[3] CMP Study, at 15.

[4] CMP Study, at 14–15.

soft drinks under his own private label. The brands of local soft drink manufacturers, such as Blair House and Rock Creek in Washington, D.C., Suburban Club in Baltimore, Frank's in Philadelphia, Graf's in Milwaukee, and Faygo and Vernor's in Detroit, have been strong competitors in specific markets for decades.[5] Generally, these private brands are not franchised. In recent years, however, several of these companies have expanded from their local bases and have begun to compete in regional and national markets. For example, Shasta, which ten years ago was marketed exclusively on the West Coast, is now available in all but six states. Frank's is currently marketed in many areas on the East Coast and Faygo has branched out into almost a dozen eastern and midwestern states. In the process of expansion, these and other private brands have utilized various techniques—distant shipments from existing plants, the establishment of new production facilities in other parts of the country, contract producers (see pp. 31–35, *infra*), and, in a few cases, franchise agreements.[6] These private, largely non-franchised brands, have proven to be an important competitive factor in many a local market, the market of relevance to the consumer.

3. *Controlled Label Soft Drinks.*—With the emergence of the contract canner in the last decade, a new and substantial competitive force was introduced into the soft drink industry—*the controlled label.* With contract canners and bottlers available to manufacture them, controlled label soft drinks—in-house products marketed under the proprietary brand names of soft drink retailers, *e.g.*, 7-Eleven Cola, Yukon Club Cola (A&P), Chek Cola (Winn-Dixie)—have proliferated. Literally hundreds of new brands have entered the market, particularly in the last five years. With retailers able to allocate scarce shelf space and prime store locations to their own controlled label soft drinks and to vigorously promote them with both point-of-sale and local media advertising, controlled labels have already changed, and are threatening to change even more dramatically, the competitive standing of nationally franchised soft drinks.

B. Soft Drinks and Beverage Consumption in the United States

Soft drinks are only one of a number of competing beverages available to the American consumer.[7] For most of this century, coffee ranked as America's most popular commercial beverage. However, soft drink consumption has been climbing rapidly, growing at an annual rate of approximately 8% for the last two decades.

In 1950, soft drinks represented an estimated 9.7% of the total commercial beverage market (all beverages except water); by 1970, soft drinks had more than doubled their market share, accounting for an estimated 21.5%.[8] This increase, roughly four times as great as the rate of population growth, enabled soft drinks to become the nation's second most popular beverage in 1966.[9] If the present trend continues, soft drinks are likely to emerge as America's number one commercial beverage within the next year or two.[10]

Of particular significance is the fact that per capita consumption of soft drinks has shown a steep upward trend while the total per capita liquid intake of Americans appears to be relatively stable, thus indicating that soft drink consumption is increasing at the direct expense of competitive beverages.[11] Indeed, soft drinks have captured a share of the beverage market formerly held by coffee and other beverages.[12] It is thus readily apparent that there is a high degree of substitutability between soft drinks and other beverages; as per capita soft drink consumption has grown appreciably, the growth in per capita consumption of competitive beverages has not been as rapid.

In review, the ability of the soft drink industry to make soft drinks widely available in almost every conceivable retail outlet, to create new products and develop new container types and sizes, all while remaining competitive in terms

[5] For example, Faygo has for years been among the top three selling soft drink brands in the Detroit area.

[6] For example, Vernor's in 1970 franchised the White Rock Beverage Co. of New Jersey to produce and sell its products in the east.

[7] See *e.g.*, *Soft Drink Industry Annual Manual, 1971–1972*, pp. 62–64 (hereinafter "1971–72 SDI Manual"); Corplan Associates, Inc., *A Study of the Soft Drink Industry, 1965–1970* (1966), pp. 1, 8, 28–29 (hereinafter "Corplan Report"); American Can Company, *Carbonated Beverages in the United States—Historical Review* (1972), p. 30 (hereinafter "American Can Company Report"); Ko Ching Shih and C. Ying Shih, *American Soft Drink Industry and the Carbonated Beverage Market* (1965), pp. 8–10, 30–31 (hereinafter "Shih Study").

[8] Affidavit of J. Lucien Smith, President of Coca-Cola USA, dated February 11, 1971, in *The Coca-Cola Bottling Company of Taft, (Inc.)* v. *The Coca-Cola Company* (Civil Action No. 71–270–CC, C.D. Cal.), pp. 9–10 (hereinafter "Smith Affidavit").

[9] See Exhibits A–D, attached hereto.

[10] See 1971–72 SDI Manual, at 62.

[11] Corplan Report, at 8, 28; 1971–72 SDI Manual, at 62–64.

[12] Corplan Report, at 28–29.

of price, has enabled per capita consumption of soft drinks to grow at the expense of competing beverages.

1. *Factors Affecting Soft Drink Consumption.*—In addition to such factors as the price, quality, and availability of competing beverages, soft drink consumption patterns are affected by the age mix of the population, climate, availability of the product, price levels, and consumer acceptance of new products.

Unlike coffee and alcoholic beverages, "[s]oft drinks are consumed more or less by all age groups, and they are easily available to the consumers through all major distribution channels." [13] At the present time those individuals under 20, those between 21 and 40, and those 41 and over each consume about one-third of total soft drink production.[14]

Soft drink consumption patterns exhibit both a high degree of regional and seasonal variation. Consumption of soft drinks is higher in summer months and in areas with warm and humid climates, such as the South.[15] For example, one survey of soft drink purchases for home consumption found that soft drinks are purchased with weekly frequency by 77% of all families during the summer, but only 48% during the winter season;[16] other studies have established regular seasonal variation in soft drink production and consumption paralleling changes in the weather.[17]

Consumer taste, flavor preferences, and willingness to try new products also have an impact on soft drink consumption patterns. On a national basis, cola has been the most popular soft drink flavor ever since 1920, when it surpassed gingerale.[18] Since 1947, various studies have shown that the cola flavor accounts for approximately 60–65% of all beverages sold.[19] While the share accounted for by cola drinks may have dipped slightly in recent years, according to some surveys,[20] cola is clearly America's most popular flavor,[21] followed by lemon-lime, orange, gingerale, and root beer. As with soft drink consumption, flavor preferences exhibit wide regional variation, with cola more popular in the South than in other areas of the country.[22]

The emergence of low calorie soft drinks in the last two decades also "has been responsible for creating a number of new soft drink consumers from former non-consumers." [23] As one source explained,

"[b]efore the introduction of low-calorie soft drinks, consumers voiced two primary reasons for avoiding soft drinks—calric content and restricted diet. With the advent of the dietetic drinks, these two barriers no longer exist." [24]

Thus, the introduction of diet flavors enabled the soft drink industry to satisfy the refreshment requirements of millions of weight-conscious Americans who otherwise would not have consumed (at least in such volume) soft drink products. Although No-Cal was originally marketed in 1952, diet-flavored soft drinks did not become a significant market factor until the early 1960's.[25] Following the cyclamate ban in October 1969, which virtually removed low-calorie soft drinks from the market, soft drink companies again responded to the dietetic needs of the consuming public by marketing saccharin substitutes, which by the end of 1970 had recaptured about 10% of the total soft drink market.[26] It appears likely that diet formulations will continue to account for a substantial share of total soft drink sales.

The last decade has also seen the introduction of "isotonic" ("Gatorade") and "thirst-quenching" ("Mountain Dew," "Fresca," "Kick') soft drinks, completely new soft drink categories.[27] "Since 1960, . . . a score of new trade names and

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[13] Shih Study, at 8.
[14] 1971–72 SDI Manual, at 64; American Can Company Report, at 37–38.
[15] *E.g.*, Shih Study, at 28–29, 32–34; American Can Company Report, at 33–34.
[16] American Can Company Report, at 40.
[17] Shih Study, at 90–91.
[18] American Can Company Report, at 13; Shih Study, at 36.
[19] See Exhibits E–H, attached hereto.
[20] See, *e.g.*, CMP Study, at 5, 23, Exhibit VI–1.
[21] American Can Company Report, at 31.
[22] See, *e.g.*, National Soft Drink Association, *1970 Sales Survey of the Soft Drink Industry*, at 3, 7–13 (hereinafter "NSDA 1970 Sales Survey"); American Can Company Report, at 33–34; Shih Study, at 36–37. Flavor preferences also vary somewhat by age (American Can Company Report, at 38), and income level (Shih Study, at 36–37), with the younger and less wealthy segments of the population preferring the cola flavor. Also see Exhibits I and J, attached hereto.
[23] Corplan Report, at 11.
[24] Corplan Report, at 29; see also Shih Study, at 38–39.
[25] American Can Company Report, at 30.
[26] American Can Company Report, at 30.
[27] Smith Affidavit, at 11.

flavors have been introduced."[28] The increase in per capita soft drink consumption has thus in part been brought about by the ability of the soft drink industry to develop new soft drink products, brands, and flavors, and the willingness of the consumer to accept them.[29]

Other natural factors contributing to the growth in per capita consumption of soft drinks are the general increase in disposable personal income[30] and the increasing tendency of Americans to congregate in urban areas.[31] Two other contributors to the growth in per capita soft drink consumption have been the major shift from small size (6–8 oz.) over to medium size containers (10–16 oz.), particularly in the home market, but also in vending machines dispensing packaged products,[32] and the ability of the industry to make readily available at virtually every location soft drinks in a wide variety of brands, flavors, and packages.

In 1971, soft drinks were available in more than 99% of the over 200,000 retail food outlets in the United States. In addition, "soft drinks are available in virtually every service station, restaurant, sports stadium, and theater in the country."[33] The total number of drug stores, plants, offices, bars and taverns, recreational outlets, oil stations, restaurants and delicatessens, laundromats, hotels and motels, drive-ins, beverage distributors, and other retail outlets dispensing or selling soft drinks may well be over a million.[34]

In recent years, there has also been a rapid proliferation of vending machines, which has produced an even more intensive coverage of the market.[35] In 1971, there were nearly 1,400,000 vending machines dispensing soft drinks in bottles, cans, and cups.[36]

The rapid expansion of drive-in eating and drinking places in recent years has also spurred fountain sales of soft drinks.[37] Fountain-dispensed soft drinks are available in well over 100,000 retail outlets.

The wide availability of soft drinks is in large measure attributable to the high degree of market penetration achieved by nationally franchised bottlers employing storedoor delivery in well-defined areas.[38]

In addition to increased availability of soft drinks generally, there has been a proliferation of brands, flavors, and containers for the consumer to select from. At a given outlet, "[i]t is not uncommon for the consumer to have a choice of 25–30 flavors, both in dietetic and regular form, thus further reducing the possibility of not being able to satisfy every consumer taste."[39] Some large food retailers now stock well over 100 soft drink products, packages and sizes, a noticeable increase over 1960.[40]

The consumer also has an increasing array of package types and sizes to choose from. Soft drinks are currently bottled in 32 different sizes ranging from 6 to 64 ounces, in both returnable and non-returnable bottles. Soft drinks are also packaged in 12- and 16-ounce cans.[41]

To recapitulate, the ability of the soft drink industry to respond to the consumer's desire for a widely available, economical and conveniently packaged refreshment product has been rewarded by steady growth in per capita consumption.

2. *Soft Drink Consumption—At Home and Away from Home.*—Like other beverages, soft drinks are purchased both for home consumption and for immediate consumption on or near the premises on which the soft drink is purchased. Since the turn of the century, the pattern of soft drink consumption has undergone revolutionary changes. In 1900, 70% of soft drinks were consumed on the premises of the vendors, and 30% were consumed in homes. Most of the soft drinks consumed on the premises were dispensed from soda fountains; soft drinks consumed at home were, for the most part, delivered direct from the bottling plant.[42] Neither the vending machine nor the food store were significant

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[28] Shih Study, at 36.
[29] CMP Study, at 19.
[30] Corplan Report, at 1, 9–10; Shih Study, at 28–29, 36.
[31] *E.g.*, Shih Study, at 28, 36–37.
[32] American Can Company Report, at 32–33; Shih Study at 40–42; CMP Study at 19, 25.
[33] Smith Affidavit, at 9; see also American Can Company Report, at 38–39.
[34] CMP Study, at 24.
[35] Corplan Report, at 11, 15–18; American Can Company Report, at 33; Shih Study, at 50–51.
[36] *Softdrinks*, April 1972, at 29; CMP Study, at 24.
[37] American Can Company Report, at 33.
[38] CMP Study, at 24, 26.
[39] Corplan Report, at 11–12.
[40] Booz-Allen & Hamilton, Inc., *Study of Distribution Practices in the Soft Drink Industry* (1968), p. 8 (hereinafter "Booz-Allen Study").
[41] American Can Company Report, at 21.
[42] Shih Study, at 44–45.

factors in the market. With the development of supermarkets in the 1930's, the introduction of the first open-top cooler in 1929, and the unveiling of the first coin-operated vending machine in 1935, the patterns of soft drink distribution and consumption began to change. By the mid-twentieth century, the modern self-service supermarket had become a widespread reality. In the mid-1950's, soft drinks sold for home consumption first surpassed those sold for conumption on the premises.[43] Though the estimates vary somewhat, today approximately two-thirds of all soft drinks produced are sold for home consumption.[44] The share of the market held by home-consumed soft drinks appears to have reached its zenith at this level, where it has been since 1965.[45] Nationally, food stores account for between 85% to 90% of the sales for home consumption, or just above 50% of total soft drink sales.[46] Soft drinks purchased for home consumption are typically purchased in medium- to large-size containers and multi-container cartons, sufficient to meet the family's soft drink needs for a week or more in advance.

In the area of on-premise consumption, the market is relatively evenly divided between vending (which accounts for 18% of total soft drink sales) and service sales at counters and tables (also 18%).[47] Of the total volume of soft drinks consumed in on-premise locations, 51% were purchased from vending machines with the remaining 49% involving dispensing service.[48]

In the on-premises consumption market, packaged soft drinks compete with post-mix syrup dispensed at soda fountains and in cup vending machines.[49] Cup vending (both pre- and post-mix) accounts for approximately one-third of the vending market; moreover, non-packaged goods account for roughly 18% of total consumption of soft drinks.[50]

Within this pattern of soft drink consumption, the industry has been highly competitive.

ECONOMIC REBUTTAL TO THE FTC STATEMENT

The organization of the statement submitted to Congress by the FTC staff,[51]

highlighting as it does in shotgun fashion what the staff feels are the competitive shortcomings of the soft drink industry, does not allow for the complete and thorough analysis of the state of competition in the industry that Congress should have before it in considering this legislation. Accordingly, the FTC's allegations are considered below in the context of an orderly review of all the competitive dynamics of the soft drink industry. For ease of reference, subheadings to related parts of the FTC statement have been included.

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[43] Shih Study, at 44–45.

[44] American Can Company Report, at 30; Shih Study, at 44–45. Also see in this connection Exhibit K, attached hereto. Though the soft drink industry is amply served with data from trade associations and publications, government sources, private agencies, and others, these sources often give estimates exhibiting a wide range of variation. There is no single source recognized throughout the industry as providing completely accurate information relating to flavor preferences, market shares, the importance of distribution outlets, and similar items.

[45] American Can Company Report, 31.

[46] See NSDA 1970 Sales Survey, at 5; Shih Study, at 44. One source estimates that "[f]ood chains now account for 38%; other grocery stores for 47%; and miscellaneous outlets such as liquor, drug and military stores for the remaining 15% of home consumed soft drinks." American Can Company Report, at 39.

[47] American Can Company Report, at 30; for other estimates, see NSDA 1970 Sales Survey, at 5. The importance of on-premise and off-premise consumption varies by market and region (NSDA 1970 Sales Survey, at 5, 7–13) and also somewhat from year to year.

[48] "A 1970 estimate of the relative importance of these outlets in away-from-home soft drink consumption is as follows: restaurants and lunch counters 22%; drive-in road stands 17%; plants and offices 16%; bars and taverns 12%; recreational outlets 9%; and other outlets 3%." American Can Company Report, at 38.

[49] See, *e.g.*, Corplan Report, at 17–18; *Softdrinks*, April 1972, at 27–29; Cresap, McCormick & Paget and Market Research Corporation of America, *Soft Drink Vending Study* (1966); NSDA 1970 Sales Survey, at 3–4. Post-mix syrup is used in fountain and vending equipment. At the time of sale to the consumer, the dispensing equipment mixes the syrup with carbonated water. Post-mix is sold not only by bottlers, but by wholesalers and jobbers as well. Pre-mix syrup, on the other hand, is, as its name implies, mixed with carbonated water and put in steel tanks prior to the time it is placed in machines.

[50] NSDA 1970 Sales Survey, at 3.

[51] Bureau of Competition and Bureau of Economics, Federal Trade Commission, "Statement in Opposition to H.R. 12261, and Identical Bills, Legislation Which Would Legalize Territorial Restrictions in the Soft Drink Industry," dated March 31, 1972 (hereinafter "FTC Statement").

I. There Is Pervasive and Growing Interbrand Competition Within the Soft Drink Industry [A Response to FTC Statement—Parts II–IV]

A. *Overview*

Over and above the competition that exists between soft drinks and other beverages,[52] there is pervasive interbrand competition in the soft drink industry itself, competition which is intensifying annually.[53] In fact, the last decade has produced probably the greatest increment in interbrand competition that the industry has yet witnessed. Nationally, 75 companies market over 180 trademarked brands.[54] In addition, there are a variety of local and regional brands which are a significant competitive factor in specific geographic markets.[55] Moreover, the rapid growth of soft drink consumption has not gone unnoticed by large soft drink retailers and other potential entrants into the industry. The expanding market for soft drinks has produced several new entrants in the *national* market over the last decade, including Fairmont Foods, Inc. and Shasta (a division of Consolidated Foods), as well as a host of new private labels, and the expanded distribution of specialty products, such as Schweppes mixers.[56] The growth of the contract canner and bottler in recent years has led to a rapid proliferation of controlled label soft drinks marketed by food chains, grocery cooperatives and wholesalers, convenience store groups, drug store chains, and others. Finally, there has been an increasing tendency by nationally franchised companies to enter local markets in which they had not previously distributed their products. Very few of the national franchise companies market their products in all or even a substantial number of local markets. Even some of the largest, Dr. Pepper, Canada Dry, and Crush International, are still seeking local franchisees in many areas to manufacture and sell their products. In the end, for the consumer it is the degree of competition in his local area that is the relevant consideration. The expansion of interbrand competition in many local markets, primarily through the affiliation of new and existing franchise companies with established bottling companies, who have the facilities and sales organization to immediately produce, promote, and distribute products in a local area, has made available new soft drinks to consumers.

The combination of new entrants on the national level, the growth of contract canners and bottlers, the increasing sales of controlled labels, and the entry into untapped local markets of many national franchise companies has made the soft drink industry highly competitive.

Ignoring these pro-competitive developments, the staff of the Federal Trade Commission has repeatedly asserted before Congress that interbrand competition is extremely weak, and that there "is a marked lack of meaningful price competition in the soft drink industry."[57] The Staff's assessment rests on the fact that many bottlers of the eight leading franchise companies are multi-brand bottlers, their belief that strong consumer preferences for nationally advertised brands restrict effective interbrand competition, and statistics purportedly showing high concentration among bottlers in local markets.[58] As demonstrated fully herein (pp. 25 to 45, *infra*), interbrand competition, regardless of how one measures it,[59] is extremely effective in the soft drink industry.

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[52] If soft drink prices rise in comparison with other beverage prices, many consumers will be tempted to substitute these beverages for at least some of their soft drink purchases.

[53] See Corplan Report, at 28–31 ; Shih Study, at 70–76.

[54] CMP Study, at 5 ; see also Exhibits L–M, attached hereto.

[55] For example, Rock Creek and Blair House beverages in Washington, D.C., Suburban Club and Popular Club beverages in Baltimore, and Vernor's and Faygo in Detroit.

[56] Smith Affidavit, at 10.

[57] FTC Statement, at 7. The staff's solution is to promote intrabrand competition at the wholesale level, a hypothetical competitive condition that to the best of our knowledge does not exist in regard to *any* of the countless thousands of branded food products sold in this country.

[58] FTC Statement, at 4–5.

[59] In order to properly assess the degree of competition in the soft drink industry, one has to determine how to measure competition. There is no generally accepted way to appraise interbrand competition. In fact, economists do not agree on what constitutes competition. They have definitions, but rarely do specific industries fit these definitional categories neatly and completely. Consequently, economists have developed various indicators of competition and its absence, oligopoly. Four of these indicators are numbers of firms in the industry, concentration levels, profit levels, and barriers to entry. Such indicators are often unreliable. For example, the number of firms may be irrelevant to the degree of competition. Concentration levels are equally unreliable measuring tools, since there is no necessary correlation between concentration and prices. The Economics Department of The First National City Bank, in a study of 65 well-defined industries, found that for the period 1964–1970 "price increases were smaller, not larger, in the highly concentrated industries." *First National City Bank Newsletter,* April 1972, at 15. Care should thus be exercised in relying too heavily on any one or two economic indicators.

Briefly, retail prices charged consumers are not excessive; on a per ounce basis, branded soft drinks in economical returnable packages, despite inflation, are sold at the same prices charged at the turn of the century. Moreover, the consumer typically has a wide range of retail prices available for any national brand soft drink at the many outlets in the area where he lives and works.

The number of national firms, brand, packages and flavors are proliferating rapidly in the industry. Soft drink companies, by making quality products widely available, have fully met consumer demands for service.

While there is high concentration among bottlers in some local markets, such concentration is only natural when, in 1971, over 60% of all bottling plants were located in cities with populations under 50,000, population bases inadequate to support large numbers of soft drink firms in given local areas.[60] Accordingly, such concentration is neither abnormal nor anticompetitive. Moreover, concentration of industry sales among a few leading brands is decreasing, while profits among national brand bottlers are both reasonable and declining.

Entry of new firms into the industry is relatively easy. By employing contract producers or franchising existing bottlers, new entrants can quickly achieve economies of scale and enter both local and national markets with but a minimum capital expenditure. The sheer number of firms which have entered or attempted to enter the industry is clear testimony to this fact. While some product differentiation always exists, consumer preferences for name brand soft drinks are not absolute, as evidenced by the willingness of many consumers to try controlled label soft drinks and the increasing share of the market such products have captured.

B. The Decline in Industry Concentration Ratios on a National Level
[A Response to FTC Statement—Parts II.B and III]

The strength of interbrand competition under the present system of exclusive territorial franchises is indicated by the decline in industry concentration on a national basis. The staff of the Federal Trade Commission, in a report on *The Structure of Food Manufacturing*,[61] noted that "[t]he four largest soft drink manufacturers in 1954 controlled—either outright or through franchise arrangement—*88 percent* of soft drink production and sales." (Emphasis supplied.) The same FTC report indicated that nine years later, in 1963, the four largest franchise companies and their bottlers had only *75%* of indusrty sales.[62] In 1970, the FTC staff reports that the top four firms account for only *71.5%* of the total soft drink market, and the top eight, 84.1%.[63] The total marke tshare of Coca-Cola, the leading soft drink firm, has, according to published estimates, declined from 53% in 1940 to around 40% for the 1965–1970 period.[64] Not only have market shares declined, but the relative positions of the leading soft drink companies have been unstable. 7–Up, once the nation's third largest seller of soft drinks, has watched its share of total soft drink sales fall by 50% during the last decade, from 12% in 1960 to 6% in 1970.[65] The erosion of Canada Dry's market share has been even more dramatic, falling from 8.7% in 1960 to 3.3% in 1970.[66] In 1940 Canada Dry had outsold Royal Crown 3 to 1; by 1970 Royal Crown outsold Canada Dry by 2 to 1. There can be no clearer testimony to the growing strength of interbrand competition than the decline in industry concentration and the loss of market share by leading firms.

1. *Increasing Competition from New Entrants in Local Markets [A Response to FTC Statement—Parts II.A, II.C, and III]*.—The decline in market share of the brands sold by the leading franchise companies has been brought about in part by increased interbrand competition in relevant local markets. As noted earlier, the relevant geographic market for soft drinks from both the standpoint of the producer and the consumer is local or regional. Many national franchisors lack of the financial resources to establish company-owned plants nationwide or, even with the offer of exclusive franchises, to induce local businessmen to handle exclusively a limited product line, such as that marketed by Dr. Pepper. Dad's Root Beer, Nesbitt's and many others. Such firms are widely advertising for new

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[60] CMP Study, at 5.

[61] Technical Study No. 8, prepared for the National Commission on Food Marketing (1966), at 30–31 (hereinafter "Technical Study No. 8").

[62] Technical Study No. 8, at 75.

[63] FTC Statement, at 1, 11. Though market shares estimates differ somewhat, and none are completely accurate, other studies also show that the national market share of the top four soft drink firms is declining. (See, e.g., Shih Study, at 72.)

[64] See Shih Study, at 72; FTC Statement, at 11. See also John C. Maxwell, Jr., *Printers' Ink*, June 12, 1964, at 28. Maxwell's figures show a substantial decline in Coca-Cola's total market share over the period 1954–1964.

[65] Shih Study, at 72; 1971–72, SDI Manual, at 12.

[66] Shih Study, at 72; 1971–72 SDI Manual, at 12.

franchisees.[67] By the offer of exclusive territorial franchises, such firms have been able to induce existing nationally franchised bottlers to bottle and sell limited product lines in order to fill out an incomplete line that a bottler manufactures for another franchisor. For example, in 1970, 457 of the 840 domestic bottlers of Coca-Cola bottled soft drinks of one or more additional franchise companies—over 125 bottled "Dr. Pepper," 122 bottled "Sun Rise," 73 "7-Up," 66 "Orange Crush," 65 "Nesbitt," 51 "Squirt," and 31 "Nu-Grape." [68] Through affiliation with the franchisees of established brands, additional soft drink products gain entry into previously unexplored markets, thereby intensifying interbrand competition. For example, the market share of Dr. Pepper has increased rapidly in the last decade, growing from 2.2% (32.5 million cases) to 3.5% (153.7 million cases) of total soft drink sales between 1960 and 1970.[69] The growth in market share of Dr. Pepper illustrates this market entry technique.[70] Few bottlers carry Dr. Pepper as their only brand. Dr. Pepper was able to expand into new markets by persuading over 125 Coca-Cola bottlers. 150 Pepsi-Cola bottlers, and numerous Royal Crown and 7-Up bottlers to carry Dr. Pepper as an additional product line. Dr. Pepper's recent 1970 franchise agreement with Coca-Cola Bottling Company of New York, repeatedly referred to by the Commission's staff as hindering competition,[71] is a clear illustration of the use of this market entry device. The FTC staff to the contrary, the multi-brand bottler clearly increases retail competition by making several brands, which compete against each other, available to consumers.

Other small franchisors, like Dr Pepper, used franchised bottlers of leading brands as a vehicle for quick and inexpensive entry into local markets. For example. between 1970 and 1971, Ma's Old Fashioned, Inc. increased its franchised plants from 47 to 67; No-Cal Corp. increased its franchises from 14 to 40; Schweppes from 65 to 70; and Vernor's, Inc. from 51 to 62.[72] Recent illustrations of this technique are the entry of Dad's Root Beer into the New York market via a franchise agreement with Seven-Up Brooklyn Bottling Co., Dad's entry into Milwaukee through a franchise agreement with Seven-Up Bottling Co., Milwaukee, and the entry of Dad's Diet Root Beer into the Los Angeles market through affiliation with National Soft Drinks Bottling Company, all in the last two years.[73] The recent franchise agreements signed by Crush-Hires with four Pepsi-Cola bottlers in Rocky Mount, North Carolina, Memphis, Missouri, and Carroll and Mason City, Iowa, further illustrate the competitive value of the multi-brand franchise. Thus, the multi-brand franchise, far from indicating the absence of interbrand competition,[74] has been a device by which lesser known national brands and firms with limited product lines can penetrate new markets quickly and inexpensively, and increase both their local and national market shares. The entry into new markets has been in part responsible for the dramatic growth in sales of small companies—Nesbitt's from 10 to 84 million cases between 1964 and 1970, Dad's from 3.5 to 28.5 million, No-Cal from 11 to 24 million, and Frostie from 1.5 to 71.8 million, to name just a few.[75]

It is also to be noted that if a bottler handles several brands and thereby increases his sales, the additional sales generated by supplemental brands will increase a bottler's utilization of plant capacity, raise his efficiency, lower his costs, and thereby hold down prices charged retailers for soft drinks.[76] The fact that bottlers' profits are low shows that multi-brand bottlers are in fact charging competitive prices.

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[67] See Exhibits N–1 to N–12, attached hereto.

[68] Smith Affidavit, at 10.

[69] 1971–72 SDI Manual, at 12; Shih Study, at 72.

[70] See Dr. Pepper Co. *Annual Reports*, 1963 at 2; 1970 at 16; see also Shih Study at 72. Dr. Pepper, for example, recently entered the Baltimore and Atlantic City markets by affiliating with Allegheny Pepsi-Cola Bottling Co. and Coca-Cola Bottling Co. of South Jersey, respectively (*Soft Drink Industry*, August 29, 1969, at 2), the western New York market by affiliating with three Pepsi-Cola bottlers—Niagara, Buffalo, and Batavia (*Soft Drink Review*, October 1969), the Crookston, Minnesota market by affiliating with a Coke bottler (*Soft Drink Review*, April 1969, at 10), and the Philadelphia area, again by affiliating with a Coca-Cola bottler (*Soft Drink Review*, June 1969, at 8).

[71] SeeFTC statement, at 4, 8; however, *Marketing/Communications* reports that "[b]efore franchising the Coca-Cola Bottling Co. of New York, Dr. Pepper had distribution in markets covering about 83% of the population. On this basis, it now has 96%." (June 1970, at 46.)

[72] See 1970–71 SDI Manual, at 82–92; and 1971–72 SDI Manual, at 117–127.

[73] For a list of additional multi-brand Dad's Bottlers in the upper Midwest, see *Soft Drink Review*, June 1969, at 16.

[74] See FTC Statement, at 4, 8.

[75] Shih Study, at 74; 1971–72 SDI Manual, at 12, 16.

[76] See in this connection CMP Study, at 9.

2. *Increasing Competition from Contract Producers and Controlled Labels* [*A Response to FTC Statement—Part II.B*].—The expansion of canning lines in the last decade set in motion new competition for nationally franchised soft drinks. The rise of contract canners and bottlers, able to supply controlled label soft drinks for food chains and others, has dramatically increased competition in the sale of soft drinks.[77] This development the FTC's staff has chosen to ignore.

The number of soft drink canning lines has increased from 68 in 1960 to 253, as of the end of 1970. Even as early as 1964, over 300 different brands of canned soft drinks were available to the public.[78] Today, 29 of the top 100 bottling or canning plants in the United States are active in contract canning or bottling, the majority of which package controlled labels and proprietary brands, either exclusively or in conjunction with franchised brands.[79]

The growth of the contract canner has enabled many retail organizations, who either do not wish or do not have the ability to integrate backward into production of soft drinks, to establish their own controlled label brands.

In 1958, only 4 of the top 40 food chains produced their own soft drinks, with a total shipment value of $2,425,000. In 1963, 7 of the top 40 chains reported production with a value of $21,939,000, an 804.7% increase in terms of shipment value over the five-year period.[80]

In 1966, 30% of 82 small food retailers carried private label soft drinks, 61% of 49 middle-size retailers carried at least one private label, and 87% of the 16 large retailers did so.[81] In 1967, it was reported that 94% of the high-volume take-home market retailers stocked controlled label soft drinks.[82] In 1968, more than 30 of the nation's largest food chains sold a controlled label.[83] Today, virtually every food chain, and most grocery cooperatives, carry and vigorously promote their own controlled labels. Moreover, the advent of the contract producer has enabled smaller soft drink retail outlets to sell controlled labels as, for example, in the case of People's Drug Stores, 7-Eleven convenience stores,[84] High's Milk stores, and Drug Fair in the Washington market. The result has been a dramatic increase in interbrand competition in the take-home market, with controlled labels increasing their share of soft drink food *store* sales from 4.5% in 1962 to 15% in 1967.[85]

Food chains and other retail organizations have continued to push their controlled labels through shelf and floor space allocations, promotions, and advertising in local newspapers. In 1970 controlled labels accounted for one-third of all soft drinks sold in cans through food stores.[86] During the period 1964–1970, sales of Safeway's Cragmont beverages increased from 10 to 21 million cases, Kroeger's Big K from 4 to 25 million, Winn-Dixie's "Chek" from 4 to 10 million, and A&P's Yukon Club from 6 to 19 million.[87] Indeed, several major chains have now introduced a second controlled label to further capture the market.[88]

In addition to increased competition from controlled label soft drinks in the take-home market, there is a growing threat from controlled labels and contract

[77] See American Can Company Report, at 16; Corplan Report, at 29–31; Shih Study, at 74, 76.

[78] Corplan Report, at 31.

[79] "Top 100 Firms," *Softdrinks,* January 1971, at 30–35. For example, General Beverages of Minnesota, a leading contract canner produced in 1969 ten million cases of soft drinks encompassigg 208 flavors and packages. The company's annual sales increase has averaged over 35% in recent years. *Softdrinks,* October 1969, at 38.

[80] David L. Call. "Private Label Products in Food Retailing," Technical Study No. 10, Competition in Food Retailing" (1966), at 83.

[81] David L. Call, "Private Label Products in Food Retailing," Technical Study No. 10 Special Studies in Food Marketing, National Commission on Food Marketing (1966), at 45.

[82] Booz-Allen Study, at 8.

[83] *Softdrinks,* November 1968, at 86.

[84] In October 1968, the 7–Eleven food chain, which claims it was Coca-Cola's biggest customer nationally in that year (*Softdrinks,* February 1969, at 7) became the first convenience store chain to begin selling controlled label soft drinks (*Softdrinks,* November 1968, at 84). In 1969, 7–Eleven set a goal of 20% of soft drink sales for its controlled label (*Softdrinks,* February 1969, at 7).

[85] Booz-Allen Study, at 8. In 1969, controlled labels held 22% of food *chain* sales. *Marketing/Communications,* June 1969, at 35; *Softdrinks,* November 1968, at 84–86. Moreover, in 1969, Scripps-Howard's soft drink survey of food chains in 13 leading cities found that controlled labels and regional brands accounted for 55% of the 125 brands identified. *Softdrinks,* February 1969, at 26–27.

[86] American Can Company Report, at 39.

[87] *Printer's Ink,* April 8, 1966, at 10–12; 1971–72 SDI Manual, at 16.

[88] For example, in the Washington, D.C. market, A&P sells Yukon Club and Bond Street beverages, Giant Food Stores markets Giant and Glee beverages, Grand Union markets Penguin and Grand Union beverages, and Pantry Pride (Food Fair) sells Fyne Taste and Pantry Pride beverages.

canners in the on-premises market. Supermarkets are beginning to promote their own controlled labels in the vending machines, snack bars and service food stands that they maintain in captive locations in their stores.[89]

Moreover, large sectional and national vending companies are now seeking out contract canners to provide proprietary brands for their markets.[90]

In sum, controlled labels and contract canners have intensified interbrand competition in many major soft drink markets. While no controlled label has a significant market share nationally, given controlled labels do have substantial shares in specific markets.

3. *Increasing Competition from the Entry of New National Brands.* [*A Response to FTC Statement—Parts II.A an II.B*].—Entry barriers are not high in the soft drink industry. The ability to utilize contract canners or national brand bottlers to produce new products greatly reduces entry barriers attributable to economies of scale and large capital outlays for plant and equipment. The firms which have tried with varying degrees of success to enter the soft drink industry include Del Monte,[91] Beech Nut, Howard Johnson's,[92] General Mills,[93] Nestle's,[94] Fairmont Foods (Double Cola),[95] Darmarc Products,[96] Sunkist,[97] Shasta, and Faygo. There has been no shortage of firms attempting to enter the industry. Some of these entrants failed, as in any industry, primarily because they could not compete in terms of price, quality, and availability. Others, however, have grown dramatically.

In 1960, Consolidated Foods acquired Shasta Water Co. In less than a decade, Shasta was developed into a 27-flavor line (diet and non-diet) marketed solely in cans (90% of sales) and 26-ounce non-returnable bottles. From one plant, Shasta has expanded to where it now operates eight production plants and utilitizes additional contract canners.[98] Shasta, now marketed in 44 states, has increased its case sales from 27 million (0.8% of the total soft drink market) in 1966 to 68.7 million (1.6% of the market) in 1970.

In mid-1965, after over fifty years of serving only the Detroit market (where it was number three in sales), Faygo began shipping its line of 28 different flavors in non-returnable bottles to food stores in surrounding states, including Ohio, Michigan, New York, Indiana, and West Virginia.[99] Operating out of its plant in Detroit, Faygo has nearly doubled its sales from 9 million cases in 1966 to slightly over 17 million in 1970.[100] In fiscal 1972, Faygo reported a 73% increase in sales. Several Shasta plants, as well as the Faygo plant, are now listed among the industry's top 100.[101]

While new entrants such as Shasta and Faygo have sought to distribute their products primarily through food stores, other new national firms have attacked the franchised bottlers' share of the soft drink vending market.[102]

Allegheny Beverage Corporation, for instance, installed almost 17,000 full-service Valu Vend soft drink vending machines throughout the nation last year and proclaims its intent "to blanket the nation with Valu Vend vending machines." [103]

The new competition in the vending market has led *Softdrinks* mazagine to conclude that the franchised bottlers' share of the market "is being challenged as never before." [104]

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89 *Softdrinks*, April 1972, at 27.
90 *Softdrinks*, April 1972, at 27.
91 See *Printer's Ink*, June 12, 1964, at 29.
92 *Printer's Ink*, April 28, 1967, at 12.
93 *Softdrinks*, August 1971, at 27.
94 Nestle's has just introduced a line of imitation citrus-flavored soft drinks marketed in cans. (*Softdrinks*, May 1972, at 76.) By June 1972, Nestle's had signed 18 franchise agreements with bottlers in leading cities, with additional franchise negotiations in the final stages. *Softdrinks*, June 1972, at 11.
95 Smith Affidavit, at 10.
96 In early 1972, "False Face," a new line of noncarbonated beverages with deliberate mismatching of color and flavor combinations (e.g., a purple-colored orange flavor) was introduced in St. Louis, Kansas City, and Indianapolis by Darmarc Products, Inc., with national distribution through franchising scheduled for next spring. (*Softdrinks*, May 1972, at 17–18.)
97 In 1968–1969, Sunkist introduced five carbonated fruit flavors (both diet and non-diet). *Marketing/Communications*, June 1969, at 44.
98 *Softdrinks*, April 1968, at 38–40, 43.
99 See *Softdrinks*, May 1968, at 34–39; *Soft Drink Review*, July 1969, at 17.
100 1971–72 SDI Manual, at 16.
101 *Softdrinks*, January 1971, at 30–35.
102 *Softdrinks*, April 1972, at 27.
103 Allegheny Beverage Corporation, *1971 Annual Report*, at 3. Allegheny expects to sell 400,000 similar machines within the next four or five years. *Softdrinks*, June 1972, at 10.
104 *Softdrinks*, April 1972, at 27.

C. There Is Effective Price and Brand Competition in the Soft Drink Industry [*A Response to FTC Statement—Parts I–III*]

As noted earlier, cola is the most popular soft drink flavor, accounting for approximately 60–65% of all soft drink sales. In the last decade, scores of new cola drinks have been introduced. Nationwide, a survey by the A. C. Nielsen Company reported that 135 different brands of cola were offered for sale in the United States during the period June–July 1970.[105] The variety of cola brands in local markets is also extensive. For example, as indicated on Exhibit O, attached hereto, over 25 different brands of cola are available in retail stores in the greater Silver Spring, Maryland area alone, without including diet colas (Tab, No-Cal, Diet Rite, Diet Pepsi, etc.). Moreover, established producers are constantly trying to capture a greater share of sales with new products, such as Faygo's cherry-flavored cola,[106] Royal Crown's cola-flavored Gatorade,[107] Canada Dry's caffeine-free "Sport Cola," [108] and Seven-Up's "Howdy Cola." While not all new products or controlled labels have been successful, the proliferation of controlled labels in the take-home market and studies showing the growing willingness of most American consumers to try private label soft drinks [109] clearly refute the FTC staff's unsupported assertion that "most consumers refuse to buy private label products and will spend several cents more for a name brand soft drink" because of strong brand preferences created by advertising.[110] Consumers are not so naive or totally swayed by advertising as the FTC would have us believe. The FTC staff to the contrary, experts estimate that controlled labels may soon account for over 30% of total chain store volume.[111]

In the on-premise market, national brand bottlers compete through the services they provide consumers by making their products available in literally millions of locations.[112] The service provided by the energetic marketing efforts and wide distribution programs of Coke, Pepsi, and Royal Crown is revealed by the fact that cola sales account for roughly 70% of on-premises consumption, versus approximately 60% in the at-home market.[113] There is intensive interbrand competition between the nationally branded colas in making their products available to consumers through securing the maximum number of locations from which to distribute their respective soft drinks.

Moreover, there is substantial *intra*brand competition in the case of Coca-Cola since post-mix Coke syrup (even when sold by franchised bottlers) is not subject to territorial boundaries and since post-mix syrup is distributed primarily through some 3,000 wholesalers and jobbers, and not by bottlers of Coca-Cola,[114] even though most Coke bottlers now sell post-mix.

Coca-Cola, which at one time had a commanding lead in cola sales, has seen its market share erode during the last several decades.[115] In the thirties and forties, Pepsi-Cola gained market share from Coke by offering more cola for the money. In the mid-fifties, Coke lost market share as Pepsi took the lead in introducing family-size bottles; in the early sixties, Royal Crown and Pepsi took the lead in promoting diet cola.

In addition, despite inflationary pressures which have caused production and distribution costs to increase appreciably, the A. C. Nielsen Company reports "that the average retail price per ounce of Coca-Cola in 16 oz. returnable bottles in the U.S. is the same today in most markets as was the price per ounce in 6½ oz. returnable bottles in 1902." [116] Moreover, Coca-Cola bottlers, as well as Pepsi-Cola bottlers, have now introduced large-size returnable bottles (28–36 oz.) which in some markets have reduced the price per ounce to almost one-half cent, significantly below even the 1902 per ounce price.

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105 Smith Affidavit, at 11.

106 See *Soft Drink Review*, May 1968, at 8; October 1969, at 16.

107 See *Soft Drink Review*, September 1968, at 17.

108 *Softdrinks*, August 1968, at 22, 29; *Softdrinks*, October 1968, at 19, 22; *Soft Drink Review*, March 1968, at 20; *Soft Drink Review*, September 1968, at 22; and *Soft Drink Industry*, June 20, 1969, at 17.

109 American Can Company Report, at 40; Corplan Report, at 6–7. In fact, *Softdrinks* quotes a Food Fair executive as saying that "[s]urprisingly, most shoppers don't buy soft drinks by brand. . . . We've found that they'd rather buy our house brand with substantial savings. So much so that our canned drinks outsell Coke, the closest competing name brand, by 2½ to 1." *Softdrinks*, November 1968, at 85.

110 See FTC Statement, at 9. The staff also implies (FTC Statement, at 2) that brand bottlers enjoy higher prices because they devote large funds to advertising. The fact of the matter is that bottlers only spend 2–3 percent of sales on local advertising. (CMP Study, at 25.)

111 See *Marketing/Communications*, June 1969, at 35; Corplan Report, at 7.

112 American Can Company Report, at 31; *Softdrinks*, April 1972, at 27.

113 American Can Company Report, at 31.

114 Corplan Associates, *A Study of the Role of the Bottlers of Coca-Cola in the Post-Mix Business* (1967), at 2, 5 (hereinafter "Post-Mix Study").

115 Shih Study, at 74–75; *Printers' Ink*, June 12, 1964, at 28.

116 See Smith Affidavit, at 9; and Exhibit P, attached hereto.

For example, six 32-oz. returnable bottles of Pepsi-Cola retail for 99¢, plus refundable deposit, in Newport News, Virginia.[117] In almost all markets, Coke, Pepsi, and Royal Crown in 16-oz. and larger returnable bottles are competitive with chain private labels and other soft drinks on a price per ounce basis. With a variety of local establishments selling any given cola brand, the consumer also has a range of competing prices on the branded product of his choice.[118] What has made nationally branded colas more costly is the shift to cans and non-returnable containers. When a consumer buys a soft drink in these containers, he pays 4 or 5 cents for the cost of the container, in addition to the cost of the soft drink itself.

Competition is growing not only among colas, but between colas and other flavors.[119] For example, 7-Up has seen its sales picture erode.[120] The decline in 7-Up's sales followed Royal Crown's introduction of Par-T-Pak in 1956, Pepsi's introduction of Teem in 1959, Coca-Cola's introduction of Sprite in 1960, and the continuing introduction of dozens of lemon-lime flavored controlled label products.

D. The Strength of Interbrand Competition Is Further Shown by the Reasonable Rate of Return Earned by Franchised Bottlers

Further evidence of the pervasiveness of interbrand competition and the decline of market strength of nationally branded is provided by the rate of return data on the earnings of soft drink bottlers. A survey conducted by the National Soft Drink Association in 1969 showed that the average net operating income of the bottlers was 7.7% of sales, and for small bottlers, only 3.85%.[121] For the same year companies in the Fortune "500" list showed a net operating income to sales ratio of over 9%. Furthermore, the average rate of return on corporate assets for soft drink bottlers has fallen substantially during the last three decades, from an average of 18% in 1939.[122] The fact that national brand bottlers' profits are not abnormally high compared with the rate of return of other manufacturing sectors of the economy (See *Report of the Federal Trade Commission on Rates of Return in Selected Manufacturing Industries, 1961–1970* (1972)) and that they exhibit a long-term downward trend testifies to the strength of competition in the industry.

E. The Franchised Bottling Industry Is Dominated by Small, Independently Owned and Operated Businesses

[*A Response to FTC Statement—Parts II.C, III, and IV.A*]

The FTC staff continuously asserts that the bottling industry is made up primarily of franchise company-owned plants, publicly held multi-plant corporations, and conglomerates.[123] The fact of the matter is that 93% of the 2,878 bottling plants operating in the United States in 1971 were privately owned, and for the most part such plants have had the same family ownership for decades.[124] Of these plants, 1,765 (or 61.3%) are located in cities with populations under 50,000. Moreover, only 100 bottling plants are franchise company-owned; only 65 plants are owned by publicly held corporations, and only 60 bottling plants are owned by conglomerates.[125] Conglomerate-owned plants account for less than 4% of total soft drink production.[126]

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117 See Exhibit Q, attached hereto.

118 It is meaningless to assert, as does the FTC staff (FTC Statement, at 7–8), that the consumer is not able to purchase a Coke from the Coca-Cola bottler of his choice. He does not have such freedom to choose the producer for any national brand food product. What is relevant is that a consumer can purchase a Coke from any number of retailers who, while they may be supplied by the same bottler, sell, as would be expected, at different retail prices. There does exist price competition among retailers for final sales of the same brand of soft drink to consumers. For example, People's Drug Stores regularly sell 8-packs of 16-oz. returnable bottles of Coke at price levels 15–20% below those charged by food chains in the Washington, D.C. market. (See Exhibit R, attached hereto.) See also Exhibit S attached hereto reflecting varying retail prices in San Diego.

119 The share of the total soft drink market held by cola-flavored soft drinks is, according to some estimates, declining. See CMP study, at 5, 23, and Exhibit VI–1.

120 Shih Study, at 74; 1971–72 SDI Manual, at 20.

121 National Soft Drink Association, *1968 Financial Survey of the Soft Drink Industry*, at 11; see also Smith Affidavit, at 9. The CMP Study (at 30) also found that for the bottlers studied the median pre-tax profit on soft drink sales was 6%.

122 The rate of return for the bottled and canned soft drink industry was 15.99% in 1938, 18.21% in 1939, 8.13% in 1947, and 6.63% in 1954. For all manufacturing industries, the corresponding rates of return were 2.62%, 6.00%, 10.34%, and 6.04%. See George Stigler, *Capital and Rates of Return in Manufacturing Industries* (1963), Tables A–11, A–14, B–1, and E–1.

123 FTC Statement, at 5, 8, and 12–19.

124 CMP Study, at 6, 16–17.

125 CMP Study, at 17.

126 CMP Study, at 17.

III. The Removal of Territorial Retrictions in Soft Drink Franchises Will Be Detrimental to the Public Interest

A. *Overview*

The removal of territorial restrictions in soft drink franchises will not bring about any substantial saving to the American consumer; indeed, the net effect of the removal of such restrictions may well be to increase retail soft drink prices, especially in the long run, and to eliminate the availability of soft drinks in hundreds of thousands of locations across the United States. In addition, the removal of territorial restrictions is likely to diminish the presently intensive interbrand competition in the soft drink industry by reducing the number of soft drink bottlers available to handle, as additional lines, the products of smaller nationally franchised companies. Moreover, it may affect similar territorial licenses employed by several dozen small franchised companies not parties to the FTC complaints and, potentially, might even destroy bottlers' contracts with the syrup companies in their entirety. (See p. 60, *infra.*) Furthermore, the relief proposed by the Commission will diminish the competitive capability of the small businessman in the American economy. The small food retailer, the small bottler, and the small franchise company will all suffer. The end result of the Commission's action may well be further expansion of the market share of the bottling subsidiaries owned by the syrup companies, increased backward integration into soft drink production by food chains, and the growth of a few large regional bottlers. Finally, the relief proposed will be detrimental to the public interest because it will provoke, almost overnight, a dramatic shift from the use of returnable bottles to non-returnable containers. Thus, the relief proposed by the FTC is contrary to the public interest which § 5(b) of the FTC Act directs the Commission to consider in issuing its complaints (15 U.S.C. § 45(b)). The social cost to the environment, the consumer, and the small businessman demand that the FTC's complaints be legislatively rejected.

B. *The Removal of Territorial Restrictions May Increase the Retail Price of Soft Drinks*

[*A Response to FTC Statement—Parts I and VI*]

The steadily diminishing estimates of retail price savings to be gained from eliminating territorial restraints underscores the improbability of any saving whatsoever. In December of 1969, the staff of the Federal Trade Commission in a document released to the Congress suggested that "a rule prohibiting certain forms of territorial restrictions in the soft drink industry . . . [might bring about] a potential gain to the consumer of *perhaps one billion dollars or more* from a really significant improvement of the structure of the industry [which might emerge] . . . if the protective system of territorial restrictions on bottlers could be removed."[127] Subsequently, other proponents of the removal of territorial restrictions have conceded that the magnitude of annual consumer savings might be only *$500 million* annually.[128] Now, the Federal Trade Commission, despite the increase in industry sales, has further retreated and argues only that "territorial restrictions may well cost consumers over *$250,000,000* a year in higher prices."[129] (Emphasis supplied.)

Originally, the Commission's staff based its prediction of savings to the consumer on the fact that controlled labels in chain stores allegedly sold at a price 30% below that of the nationally franchised brands. It then, without the slightest supporting evidence, assumed that the elimination of all franchise territorial restrictions will reduce the price of nationally branded soft drinks to the level obtained for controlled labels in chain stores. The Commission's staff has now abandoned this superficially appealing, but fallacious, analysis,[130] and

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[127] See *Washington Evening Star*, June 10, 1971.

[128] See Mark Silbergeld, "The All Bottled Up Soft Drink Business," *New Republic*, March 25, 1972, at 7.

[129] FTC Statement, at 3, 4. Even assuming that the staff is correct and there is a $250,000,000 annual saving at the wholesale level, such a saving in the 3.3 billion (192 ounce) case equivalent soft drink market would lower wholesale prices by 7.4 cents a case. Assuming again that the saving is passed on by the retailer to consumers, the consumer will save approximately one-third of a cent on each soft drink purchased.

[130] The analysis ignored the fact that nationally branded products traditionally sell at a price 20-25% above private label products and, that even in industries without territorial restrictions, such a differential has always existed. (Technical Study No. 7, "Organization and Competition in Food Retailing," National Commission on Food Marketing (1966), at 137 [hereafter "Technical Study No. 7"].) Moreover, private label soft drinks are low-profit items, often used as loss leaders. See *Marketing/Communications*, June 1969, at 35. In addition, the staff's analysis ignores the fact that most private labels are

currently bases its estimate of a $250,000,000 saving on the fact that "neighboring bottlers (within a 150-mile area) sell the same brand of soft drinks at wholesale prices which *may* vary by *as much as* 30%."[131] (Emphasis supplied.) Because of varying costs, some wholesale price difference can probably be found for most branded consumer products within a 150-mile radius. In metropolitan areas, where soft drink prices are typically higher, wages are also higher, land, construction and insurance costs are greater, taxes more burdensome, and distribution costs increased as a result of urban traffic congestion. Thus, while the fact of such a wholesale price range for a given brand of soft drinks may in some cases be true, the conclusion that the consumer is harmed by higher than necessary prices does not necessarily follow. The critical assumption is that the lower-priced soft drinks would necessarily capture an additional share of the market. For example, the fact that a rural Pepsi-Cola bottler can sell Pepsi at a whole price 15% below that charged in a metropolitan area 100 miles distant does not mean that he could ship Pepsi 100 miles into the urban area and still sell it at such a low wholesale price. The plain fact is that in most instances the higher-priced differentials charged for soft drinks represent higher taxes, labor, land and store-door distribution costs of large, urban bottlers in metropolitan areas, such as Washington, D.C. and Detroit. However, it is these higher-cost urban bottlers, with the production facilities to market cans and large non-returnable bottles (the products most demanded by the chains), strong financial resources, modern plants and equipment, reduced transportation costs because of close proximity to the central warehouse of the chains, and other advantages, who would be likely to capture the large warehouse delivery accounts, at least in the long run, the staff's assertions about "backhauling" nothwithstanding.[132] The Commission's assumption that the average price of national branded soft drinks will fall in the long run is highly questionable.[133] This can be seen by a specific analysis of the off-premises and on-premises markets.

1. *There Will Be No Price Savings to the Consumer in the Take-Home Market.*—As noted earlier, the take-home market accounts for approximately two-thirds of total soft drinks sales. Food stores account for approximately 85–90% of the take-home market, chain stores account for an even smaller percentage, estimated to be 38% of the take-home market. Any savings to the retailers operating food chains and grocery cooperatives through lower wholesale prices on warehouse delivery will thus affect only a small part of the soft drink market. Moreover, the Commission's concern with the *wholesale prices charged retailers* is totally irrelevant to the *retail prices charged consumers.* The fact of the matter is that supermarket chains in many areas of the country price identical product sizes of nationally branded soft drinks identically.[134] They base their retail price to consumers on a percentage markup from the highest wholesale price charged by any one of the national brand bottlers. Thus, for example, in many areas, even if Coca-Cola's wholesale prices in a given market were reduced as a result of the elimination of territorial restrictions, unless Pepsi-Cola's, Royal Crown's, 7-Up's wholesale prices are also reduced, the present pricing policies of many food chains would not result in any wholesale price saving for Coca-Cola being passed on to the consumer, but rather these chains would keep any savings as additional profit margin.

only distributed in chain stores (American Can Company Report, at 39), and that chain stores account for only a fraction of all soft drink sales. Even if warehouse delivery of nationally branded soft drinks, envisioned by the Commission's staff, could reduce prices to food chains, it would not product savings to the consumer in other soft drink markets, representing well over half of soft drink purchases, where warehouse delivery is not feasible. In fact, in the case of vending machines (which for mechanical reasons have to dispense soft drinks in multiples of a nickel) and in other low-volume retail outlets, a small reduction in the wholesale price would have little effect on retail prices charged consumers.

[131] FTC Statement, at 6. The staff's purported 30% wholesale price differential is not documented anywhere in their statement. In fact, in the vast majority of areas throughout the country, the maximum range is only 10–15%. See, *e.g.,* CMP Study, at Exhibit VII–5. That study reported that "[t]he differing prices between market areas are attributable mainly to local labor and union conditions; the variance in prices among contiguous bottlers of the same brand located in the same market area is primarily a result of adjustments necessary to meet interbrand competition." (CMP Study, at 30, Exhibit VII-5.)

[132] "[O]nly the largest bottlers, who have appropriate transportation equipment and production capabilities and who are located in larger cities where most chain store warehouses are also situated would be in a position to serve these larger accounts." CMP Study, at 31.

[133] CMP Study, at 8, 35.

[134] For example, almost all large food retailers in Washington, D.C., charge $1.03 for six 12-oz. cans of Coca-Cola, Royal Crown, and Pepsi-Cola, and $1.05 for six 16-oz. nonreturnable bottles.

In many instances, chain stores have also pressed bottlers for price promotions but have not been willing to pass the savings on to the consumer.[135] There is thus little hope that any wholesale price savings resulting from the elimination of territorial restrictions will be translated into comparable retail price savings that actually benefit the consumer.

More importantly, if chain stores are successful in pressuring soft drink bottlers into warehouse delivery, they will shift the package mix in which nationally branded soft drinks are sold almost exclusively to non-returnable containers.[136] From the standpoint of price savings to the consumer, soft drinks sold in returnable bottles are 30% cheaper than non-returnables.[137] In the Washington, D.C. metropolitan market, six 12-oz. cans of Coca-Cola sell for $1.03 at most retail outlets. This translates into a price of *$1.03* for 72 ounces of cola. In the same market, six 16-oz. returnable bottles of Coke sell for $1.13, including a 30¢ deposit. When the refundable deposit is excluded, the price for 72 ounces of cola in returnable bottles is *62¢*, a price that is competitive with the private labels. If the chains succeed in eliminating the returnable bottle through exclusive reliance on warehouse delivery, this will place upward pressure on soft drink prices on a per ounce basis which will more than negate the retail price saving, if any, obtained from intrabrand competition on non-returnable packages.[138] For the foregoing reasons, there is likely to be no price saving in the at-home market in either the short run or in the long run as the industry is recast into a regional oligopolistic structure.[139]

2. *There Is Likely To Be a Rise in Prices in the On-Premises Market.*—At the present time, almost one-third of all soft drinks are sold for consumption on the premises. On-premise consumption accounts for a substantially higher share of the major brands sold, since, through extensive distribution of their products, nationally marketed products are widely sold in this market. If many small bottlers lose their high-volume chain accounts, to reach a break-even point and maintain a profit, they will have to raise the prices they charge low-volume, on-premises accounts (as well as other at-home accounts still served by route delivery).[140]

Loss of high-volume chain accounts would also raise both the bottler's route delivery cost, since a given route would be making more low-volume stops, and his production costs, since plant utilization would be appreciably lower.[141] Since consumers who purchase soft drinks for consumption on the premises only buy a single bottle at a time, the price that retailers can charge consumers is quite

[135] If wholesale prices for branded soft drinks are reduced, the decision to pass on such potential savings would be left to the discretion of the food chain. Chain stores also are unlikely to reduce the retail price differential between national brand soft drinks and their own controlled label brands, which in some cases may provide a greater profit margin. (CMP Study, at 8.)

[136] See CMP Study, at 33, 35.

[137] The fact that the price per ounce of soft drinks in returnable bottles is substantially cheaper, when the deposit is excluded, has been widely recognized. "[T]he purchase price of soft drinks in throwaway glass is 30 percent more than when it is sold in returnable containers." Hannon, "Bottles/Cans/Energy," *Environment*, March 1972, at 11. See also Roger W. Strelow, formerly Director of the Office of Environmental Affairs, Dept. of H.E.W., testimony on H.R. 14863, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., Sept. 18, 1970, at 18: "The consumer pays more for a beverage in a nonreturnable container than in a returnable one. This holds true in some cases even when the deposit is included in the price of the returnable container." For example, a case of branded 10-oz. non-returnables at wholesale is "generally 28 to 39 per cent higher in cost than a case of 10-ounce returnables." CMP Study, at 35. Thus, for the average case size, the cost of non-returnables is almost 75¢ higher than returnables.

[138] "[I]t has been estimated that a return to returnable bottles from throw-away bottles and cans would reduce the purchase costs [of beverage containers] by $1.4 billion per year." Bruce M. Hannon, "Bottles/Cans/Energy," *Environment*, March 1972, at 14. Conversely, a shift in package mix by national brand soft drink bottlers from 60% plus returnable to primarily non-returnable packages would increase the purchase cost of containers by hundreds of millions of dollars. (See in this connection CMP Study, at 35.) The increased container cost would then be passed on by bottlers and retailers to the consumer, offsetting the insubstantial price saving, if any, that may result from increased intrabrand competition. At 75¢-$1.00 per case retail, the annual cost to the consumer from converting franchised bottlers' returnable case sales into non-returnable may well be in the neighborhood of a billion dollars annually.

[139] CMP Study, at 8, 35.

[140] CMP Study, at 8–9, 40–41. In other cases, rather than raise prices, local bottlers may drop some of their less profitable accounts or serve them less frequently, thereby diminishing customer service and decreasing the wide availability of soft drinks. CMP Study, at 8–9, 34.

[141] For many bottlers, loss of chain supermarket sales would in all probability lead to smaller production runs and poor utilization of production equipment with the resulting reduction in efficiency raising operating costs, and thereby placing additional upward pressure on wholesale prices. CMP Study, at 9, 35–36.

elastic. Accordingly, to the extent that bottlers who lose their chain accounts still service these low-volume accounts, they will pass on their cost increases to retailers, who in turn will pass them on to the relatively price-insensitive consuming public. The result may well be that retail price increases in the on-premises market more than offset any price saving from warehouse delivery in the at-home consumption market.

There is no basis in fact to believe, as the FTC staff asserts, that there will be "lower soft drink prices to consumers" since retailers will "pass on much of the wholesale price savings.[142]

C. Removal of Territorial Restrictions Will Destroy Small Businesses in the Soft Drink Industry

As the staff of the Federal Trade Commission has recognized, "[p]reserving small business has been a traditional and proper concern of Congress as well as the Commission."[143] Contrary to the staff's assertions,[144] removal of territorial restrictions will harm the small bottler and at the same time put the small franchise company and the small food retailer in a more disadvantageous competitive position.

During the last few years, small soft drink bottlers have often consolidated their territories and have merged with adjoining bottlers.[145] This activity represents a healthy evolution of the industry into economic units better able to serve the public in an era which has seen dramatic improvements in the highway system, new developments in production and distribution equipment, the increasing urbanization of society, and a general trend in all areas of food manufacturing and distribution toward larger economic entities.[146] Many small bottlers still exist in the industry, and their investment in plant and equipment runs into the hundreds of millions, if not billions, of dollars. They provide valuable public service to their communities, generate employment opportunities in cities of all sizes, and pump earnings into the financial mainstream of small-town America.

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142 FTC Statement, at 6. In this connection, it is also to be remembered that many of the factors affecting the wholesale price of soft drinks are fixed and beyond the power of the bottler to control. Syrup and other material costs, for example, account for approximately 25% of the wholesale price of soft drinks. Standard & Poor's Industry Survey, "Soft Drinks—Candy" (August 26, 1971), at S–10. Such costs, as well as retail margins, are beyond the control of the franchised bottler.

143 FTC Statement, at 3.

144 See FTC Statement, at 5.

145 The FTC staff asserts that territorial restrictions create artificial markets "too small to support an efficient-sized plant" (FTC Statement, at 5, 19). The staff, however, never defines in their statement to Congress what constitutes an efficient size plant. However, according to standards set out by the FTC staff itself in an earlier study, most bottling plants operating today are more than the minimum efficient size. In Technical Study No. 8 for the National Commission on Food Marketing, the Commission's staff recognized that distribution costs tend to lessen the optimum size of an efficient plant and that "[i]n low consumption areas, typical of the smallest regions or States, the minimum efficient size plant is often smaller than in high consumption areas, typical of the largest geographic regions or States.' The FTC reported that in 1966, measured as a proportion of industry sales, the minimum efficient size plant for bottled soft drinks was less than 0.1% of total soft drink sales. The FTC staff gave several ways of measuring minimum efficient size plants. First, a minimum efficient size plant was defined as the smallest census establishment size class which increased its share of total industry value by 1% or more during a given period. Using this approach, the minimum efficient size plant had \$1.5 million dollars in soft drink sales. The second approach to determining minimum efficient size plant was to use the census establishment size class with the lowest labor cost as a percent of value of shipments. This approach shows the minimum efficient size plant in the soft drink industry to have had \$700,000 in sales. (See Technical Study No. 8, at 96–99.) Although we do not accept the validity of these approaches to measuring efficient size plant, which produce widely varying results when applied to the soft drink industry, it appears that most soft drink plants today are efficient by the FTC's staff's published standards.

146 The decline in number of firms in the soft drink bottling and canning industry in the last two decades is comparable to that in other food manufacturing industries. As the CMP Study reports (20), "[t]he number of establishments in the food and kindred products group as a whole declined by 22 and 13 percent between 1958 and 1967 and 1963 and 1967, respectively. During these periods the number of establishments in the soft drink bottling and canning industry declined by 23 and 13 per cent, respectively—a rate equivalent to the entire food and kindred products group." Moreover, much of the decline is due to such factors as favorable purchase prices, the owner's need for liquid funds, his need to obtain marketable assets so that his estate tax liability may be both fairly valued and easily paid, and the failure of a new generation to carry on the family business. Moreover, not all acquisitions have involved small bottlers, since the soft drink industry has not been immune from conglomerate merger activity. In any case, contrary to the FTC's assertion, the need to remove territorial restrictions to achieve efficient size plants has not been a dominant factor in this merger activity, since a bottler can always increase his production volume by (1) handling other brands in the same or larger territories, (2) by selling his own private brands, and (3) by acting as a contract producer for controlled label brands.

Contrary to their current representations to Congress that small bottlers will gain from the removal of territorial restrictions,[147] the Commission and its staff have consistently recognized that the small bottler will be adversely affected.

Although they do not so state in their presenation to Congress, the Commission staff has recognized that special interim relief measures are required to protect small small bottlers from complete loss of their financial interests, including such things as restrictions on expansion by Coca-Cola Company-owned bottlers and restricting acquisitions by large bottlers.[148] The Commission itself has also acknowledged the need for such "special" relief. Thus, in releasing the form or order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint, the Commission specifically reserved the right to grant other relief "as may be supported by the record to protect the competitive viability of small bottlers." Furthermore, Alan S. Ward, Director of the Bureau of Competition, stated as follows in letters sent to various Members of Congress:

"[T]he Commission staff is concerned about the implications for small bottlers of the relief proposed in our proposed complaints. Further, the Commission is not likely to be unsympathetic to the problem if it does appear that such injury might occur. The Commission has the power, as you know, to tailor its orders in these cases to remedy the violation and minimize the possible damage to small bottlers. An order might require some divestiture of assets, forbid or only conditionally permit certain types of transactions, and preserve some territorial limitations for a further period of time.

"I assure you that we are giving a great deal of thought to problems of relief in these cases, and we will recommend orders that will accommodate the interests of small bottlers as much as possible."

There is no question that many small bottlers will be driven out of business.[149] The big gainers may be the soft drink franchise companies which operate company-owned bottling plants in strategic locations throughout the country, large, conglomerate multi-plant bottling companies, and food chains who would integrate backward into soft drink production by acquiring national brand bottlers, as Thriftimart did in the case of the Cocoa-Cola Bottling Co. of Taft, Inc. The FTC staff has recognized this when, in discussing proposed relief, they refer to a need to "protect small bottlers from being driven out of business by dual distribution practices of respondents." [150] In the long run, the elimination of territorial restrictions will lead to increased industry concentration with a few large regional producers dominating the production of soft drinks.

Moreover, if the territorial restrictions are declared to be invalid under the antitrust laws, the FTC staff [152] and The Coca-Cola Company [153] have each publicly taken the position that the bottlers' entire contracts (and not solely the territorial provisions) may become void and unenforceable. If this result occurs, small bottlers may lose everything overnight as a matter of law rather than over a period of months or years as a result of the economics of losing their high-volume, most profitable accounts.

If small bottlers of national brands go out of business, small franchise companies whose product lines are handled by these bottlers will also suffer. They will lose existing manufacturing and distribution outlets and many potential opportunities for entry into local markets. Any gain in *intra*brand competition will thus be at the expense of declining *inter*brand competition from small franchise companies.[154]

Third and finally, by promoting warehouse distributions for chain stores and grocery cooperatives, the FTC staff promotes the interest of large food retailers

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[147] See FTC Statement, at 4, 5.

[148] See Complaint Counsel, Trial Brief Filed Prior to Initial Prehearing Conference, Dkt. No. 8855, dated October 18, 1971, at VII-1, VII-2 (hereinafter "Trial Brief").

[149] CMP Study, at 10, 42.

[150] Trial Brief, at VII-2.

[152] Federal Trade Commission, Opposition to Motion for Injunction Pending Appeal, in *The Coca-Cola Co., et al.* v. *F.T.C.* (No. 72-2270, 5th Cir.), at 5.

[153] The Coca-Cola Company, "Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment on the Issue of Liability," in *The Coca-Cola Bottling Co. of Taft (Inc.)* v. *The Coca-Cola Co.* (Civ. Action No. 71-270-LTL, C.D. Cal), dated June 26, 1972, at 2, 13, 14. "The territorial provisions are the foundation of The Coca-Cola Company's method of merchandising and are at the heart of each bottler's contract. So integral to the contracts are the territorial provisions that to decide they are unlawful might vitiate the contracts in their entirety. In that event, The Coca-Cola Company and its bottlers would be without operable contractual relationships." (at 13.)

[154] If food chains and grocery wholesalers can get warehouse delivery of national brand soft drinks, there is good reason to believe many of them would discontinue handling many lesser known brands in order to reduce the growing number of soft drink products handled.

vis-a-vis Mom & Pop's and other independent food stores who now depend on route delivery from national brand bottlers for soft drinks. If small bottlers go out of business and warehouse distribution replaces route delivery as a means of distributing national brand products, the small food retailer cannot help but suffer a further competitive disadvantage vis-a-vis his large chain store competitors.[155]

In all three areas, the small businessman is the net loser from the relief sought by the staff of the FTC.

D. The Removal of Territorial Restrictions in Soft Drink Franchise Agreements Will Accelerate Useage of Non-Returnable Containers

The problems caused by the rapid shift in recent years to non-returnable soft drink containers have not gone unnoticed by the Congress. Twice in the last two years, it was the subject of hearings.[156] Regardless of the merit of the particular legislative relief sought, the sheer magnitude of the legislative concern over non-returnable containers in Congress, state legislatures and local forums testifies to the public interest in avoiding further problems posed by greater use of no-return containers.[157]

To understand the impact of the elimination of territorial restrictions on the usage of no-return containers, it is helpful to review the genesis of the switch to throw-away containers.

1. *The Territorial Franchise System and the Returnable Bottle.*—The development of the territorial franchise system for national brand soft drinks took place at a time when the returnable bottle was the only beverage container available. For example, up until 1954, the 6½-oz. returnable bottle was the only container in which Coca-Cola was sold. Many of the existing facilities used in manufacturing and distributing national brand soft drinks, including bottling plants, equipment and trucks, were physically constructed with the returnable bottle in mind. The franchises themselves, including the geographic limits within which bottlers are licensed to manufacture and sell, reflect ,among other things, the economics of distributing and retrieving the returnable glass bottle.

The traditional route selling method for distributing national brand soft drinks is a double-handling system. Route trucks leave the local bottling plant loaded to less than capacity, in order to be able to carry back empty bottles. Upon delivering soft drinks to a retail outlet, the route salesman locates, sorts, and loads the empties on the truck for delivery to the bottling plant, where, after being sorted and sanitized, they are refilled and again distributed.

The returnable bottle is heavier and stronger than the non-returnable glass container; it is constructed to endure constant reuse. Today, the average number of round-trips made by a returnable bottle before it is lost or destroyed is 14-15. By definition, a non-returnable container makes just one.

Though the returnable bottle is more expensive than non-returnable bottles and cans, many bottlers still find it more economical to use returnable bottles, where-ever possible, since the high trippage rate lowers overall production costs.[158] Thus, in 1971, approximately 60% of all soft drinks sold by national brand bottlers were packaged in returnable bottles, compared to 45% for the soft drink industry as a whole.[159]

2. *The Growth of Non-Returnable Containers.*—Although the malt beverage industry started selling beer in non-returnable cans in 1937, some 35 years ago, the technology and demand for soft drinks packaged in non-returnable bottles and cans is a relatively recent development. As late as 1961, non-returnable bottles and cans represented less than 8% of all packaged soft drink containers: returnable bottles accounted for the rest. In 1971, soft drinks in non-returnable containers represented more than 55% of all packaged soft drink sales.

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155 The FTC does assert, however, without any explanation whatsoever, that "[t]he proposed legislation will adversely affect all food manufacturing industries." (FTC Statement, at 5) The total absence of explanation underscores the dubiousness of the assertion.

156 Hearings on H.R. 14863, etc., to "Prohibit Certain No-Deposit, No-Return Containers," Before a Subcommittee of the House Comm. on Interstate and Foreign Commerce 91st Cong., 2d Sess., Sept. 18, 1970 (hereinafter "1970 Hearings"): Hearings on S. 1377, Before the Subcommittee on the Environment of the Senate Commerce Comm., 92nd Cong., 2d Sess., March 6, 10, and 16, 1972.

157 For example, in 1971, 222 bills were introduced in 47 states to tax, require a deposit on, or ban one-way containers. During 1971, some 200 localities also considered proposals to deal with no-return containers.

158 The 12-oz. returnable bottle, strong enough to withstand 50 round trips, costs the bottler about 9¢ (less than 1¢ per trip at current trippage rates), while the light and fragile 10-oz. non-returnable bottle costs about 3¢, and the 12-oz can a little over 4¢.

159 CMP Study, at 7, 25.

The swing to non-returnables has its roots in three principal forces. They are "the packaging material manufacturer's desire to exploit the potential of the beverage container market to the fullest," "the consumer's preference for a container which need not be returned to the retail establishment," and "the retailer's disinclination to handle returnable bottles." [160]

(*a*) *Pressure from Container Manufacturers.*—In 1969, 41 billion fillings (both beer and soft drinks) reached the consumer in returnable beverage bottles; in the same year, 2 billion returnable bottles were produced. From the manufacturer's point of view, consequently, a potential market for 39 billion beverage containers existed in 1969, which could have been met if no-return containers had been used exclusively. Had all these fillings in 1969 been in non-returnable containers, package producers would have sold 41 billion additional containers (at around 4c per unit) instead of 2 billion returnable containers (at approximately 10c per unit). In monetary terms, the gross revenue from the additional non-returnables sales would have been approximately $1.64 bilion versus $200 million for the returnables.[161] It is clear from this comparison that the container manufacturer has considerably more to gain from the volume sale of non-returnables than from selling relatively expensive returnables. This has become apparent to both metal and glass manufacturers.

The can industry, catering to the chain supermarkets demand for throw-away packages for controlled label soft drinks, was the first to recognize the market for non-return containers. Once cans had captured the throw-away business, the glass container manufacturers embraced the non-returnable bottle to hold their business, and have since promoted it with enthusiasm. The reason is obvious. As Darnay and Franklin have noted in their contract study for H.E.W., "[f]or glass, the non-returnable beverage bottle is a last major growth frontier." [162] W. Roger Strelow, formerly Director of H.E.W.'s Office of Environmental Affairs, amplified on this point in his 1970 testimony before Congress:

"For glass container manufacturers, the nonreturnable beverage bottle is the only product with good growth prospects; in all other glass container product categories, plastics and plastic-paper composites have taken over markets for glass." [163]

For this reason, glass containers manufacturers have been an important force in non-return promotions. Similarly, the steel, aluminum and can industries have encouraged throwaway packaging through beverage advertising campaigns, lease policies for equipment, contests, and incentives to bottlers.

(*b*) *Pressure from Consumers.*—In addition to the pressure from container manufacturers, consumer demand has encouraged the bottler to emphasize convenience packaging. The magnitude of the consumer demand for throw-aways is, however, difficult to estimate with precision. The sheer size of the recent swing to no-return containers—from 8% of all packaged soft drinks in 1961 to 55% last year—does suggest that consumer preferences may have been nurtured, cultivated, and artificially stimulated by the marketing practices of large food retailers.[164]

(*c*) *Pressures from Food Retailers.*—The third major factor in the trend toward non-returnable containers—and the one directly affected by the relief pro-

[160] Darnay, A. J., Jr. and W. E. Franklin, *The Role of Packaging in Solid Waste Management, 1966 to 1976*, Public Health Service Publication No. 1855 (1969), at 40 (hereinafter "Darnay and Franklin").

[161] Strelow, 1970 Hearings, at 17.

[162] Darnay and Franklin, at 40.

[163] Strelow, 1970 Hearings, at 17.

[164] In fact, there is some question as to whether there is any preference. Mr. Strelow reported (1970 Hearings, at 27) that "[v]arious individuals as well as citizen groups have frequently gone to supermarkets, particularly supermarket chains that have often gone completely nonreturnable or largely so, and have demanded that they at least be given the option of buying returnable beverage containers. This has met with success in some areas, although in others it has not as yet." Mayor Leo E. Green of Bowie, Maryland, testified a the same hearings (at 57) that "[w]e asked . . . our citizens to . . . buy returnables, and patronize our local merchants [who would voluntarily convert solely to returnables]. . . . One retailer just outside our community vindictively got rid of all his returnables. He is only selling non-returnable soft drinks to capture the Bowie market. This gives you an idea of the battle that will go on." In a statement submitted at the hearings, the Crusade for a Cleaner Environment observed (at 60) that "[s]ome will say that the public gets what it demands and that the throw-away is a response to public desires. This simply is not true, as in many cases the consumer is deprived of his choice in the matter as a result of efforts by the bottle and can manufacturers and the supermarkets. . . . The retailers are discouraging the purchase of returnables, going so far as to separate them from the throw-aways, hiding them in out-of-the-way unmarked areas of the stores while advertising the throw-aways." See also, "Food Chains Still Resisting Returnables," *Softdrinks*, February 1972, at 25. Many consumers have no objection to returnables. See *Softdrinks*, 1970 and 1971 Consumer Surveys, July 1970, at 20–23; July 1971, at 30–35; and "Litter Concern Ups Returnable Sales," *Softdrinks*, July 1970, at 24.

posed by the FTC staff—is the pressure exerted by large food retailing organizations. This pressure has taken two forms.

Beginning in the early 1960's, many national chain stores and cooperatives seriously began to push their own controlled label brands[166] which, almost without exception, were sold exclusively in non-returnable bottles and cans.[167] The emergence of controlled label brands generally coincided with rise to pre-eminence of the large supermarket as the main retailing channel for many food and beverage industries. Supermarkets, which accounted for approximately 25–30% of soft drink sales in 1971, now constitute the major battleground for rival soft drink brands.

In this competitive arena, the supermarkets, in launching their controlled labels, have employed a competitive strategy which both caters to and cultivates the consumer demand for convenience packages.[168] They began promoting their own controlled labels in cans and non-returnable bottles by giving them mass displays, placing them in preferred traffic locations and featuring them as loss leaders.[169] As a result, sale of non-branded soft drinks in no-return containers spurted rapidly from 2% to 15% of the food store soft drink market in the last decade.

Although national brand bottlers with their large investment in returnable bottles were not initially disposed to switching to non-returnables, they could not indefinitely ignore this new dimension in controlled label competition and the favorable market and consumer response.

To meet the chains' competitive strategy, national brand bottlers began to market cans and non-returnable bottles in the late fifties and early sixties. Over the last decade national brand bottlers gradually increased the percentage of packaged products they sold in non-returnable containers.

The use of controlled labels to pressure nationally branded soft drinks to switch to non-returnables has been widely and publicly documented. For example, W. Roger Strelow, formerly Director of the Office of Environmental Affairs, Department of Health, Education and Welfare, testified that:

"The supermarket chains have utilized their controlled-label soft drinks to help force the beverage industry to convert to throwaway packages." [170]

Supermarkets have also put pressure on franchised bottlers to convert to throwaways through their reluctance to handle returnable bottles or to redeem them for their deposit.[171] The 1968 Booz-Allen & Hamilton study, which included interviews with executives of 27 different chain stores, concluded that the preference among supermarkets for no-return containers was widespread. It found that:

"*A Strong Preference for One-Way Packages Was Expressed by Most Chain and Wholesale Headquarters Groups Surveyed.*

"Chain Store management expressed a number of objections to returnable bottles, such as:

"• The time and cost of store personnel to refund, handle, sort, and check out empty bottles.

"• The utilization and cost of space devoted to empty bottle storage.

"• Margins for soft drinks in returnable bottles, calculated by retailers on *selling price plus deposit*, are lower than percentages cited by bottlers who exclude deposits from the computations.

"• The adverse effect of returned empty bottles on store appearance.

"• The cost of funds invested in empty bottles.

"One-half of the chain and wholesale headquarters surveyed reported they are *increasing* promotional support of one-way packaging and *reducing* it for returnable bottles products in order to accelerate bottler and consumer conversion to one-ways. The pressures applied to speed up conversion to one-way packages have taken extreme forms. There were a number of examples of accelerated conversions which included the elimination by a large drug company of all returnable bottled soft drink products from their 103 stores during 1966 and the recent policy of most major grocery chains in Portland, Maine of stocking only soft drinks in one-way packages." [172]

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[166] *E.g.*, Safeway Stores' "Cragmont," Kroger Company's "Big K," A&P's "Yukon Club."

[167] See American Can Company Report, at 39. In fact 85% of controlled labels sold in 1968 were packaged in cans. *Marketing/Communications*, June 1969, at 41.

[168] See Booz-Allen Study, at 8.

[169] See, e.g., *Softdrinks*, November 1968, at 85.

[170] 1970 Hearings, at 18.

[171] The opposition of retail grocers to returnable bottles dates back to 1940. See American Can Company Report, at 22.

[172] Booz-Allen Study, at 7–8. See also "Supermarket Survey: Operators Hail One Ways," *Softdrinks*, April 1967, at 44–45 (survey of 200 leading chain, independent and wholesale food executives).

These findings have been confirmed time after time. Mr. Strelow concluded that:

"There is hardly a chain that does not have a strong anti-returnable bottle policy based primarily on the alleged high cost of handling empties. There are many chains that refuse to handle items in returnables that compete with their controlled-label throw-aways and some that refuse to carry any returnable bottles at all." [173]

There can be little doubt that supermarkets and other beverage retailers have been instrumental in bringing about the almost overnight switch to throw-away containers.

The impact of a further shift to non-returnables is obvious. Darnay and Franklin, in their contract study for H.E.W., note that:

"It is well to remember . . . looking at returnable bottle figures, that each container represents about 19 trips to the market. . . . [S]ince each returnable bottle makes about 19 trips before it is retired, each returnable bottle eliminated means the production of 19 nonreturnable containers, either glass or metal." [174]

3. *Removal of Territorial Restrictions Will Accelerate Usage of Non-Returnable Containers.*—Industry forecasts of the growth of non-returnable containers vary, but almost all sources believe that convenience packages will continue to capture even higher percentages of packaged soft drinks sales. Accurate prediction of the growth of one-way containers is difficult, if not impossible, to make, because of the large number of variables involved which do not lend themselves to quantifiable analysis.

First, recognizing the environmental factors involved in the switch to no-return containers, many governmental units, consumer groups and soft drink companies have in recent years launched a campaign to halt the tide toward convenience packaging. Many national brand bottlers have recently raised the deposit on returnable bottles to a nickel and launched campaigns to bring back returnables featuring such slogans as the "ecology package" and "Wouldn't you rather borrow our bottle than buy it?" Whether this new effort to make the returnable the "ecology package" will slow down the pace of the switch to one-way packages that prevailed in the mid-sixties is yet to be determined.[175]

Another factor that may slow down the rate of conversion to no-return containers is the conflicting economic interest of national brand bottlers who continue to sell a high proportion of returnable glass bottles. The great majority of bottlers of nationally franchised brands have not entirely shifted their production to no-return bottles and cans. Many of these bottlers have found their total distribution costs rising and their gross margin as a percent of sales falling as the percentage of their business in one-way containers has grown. While these bottlers have diversified both the size and type of package they make available to the consuming public, they have resisted demands from grocery retailers for complete conversion to no-return containers. The fact that the particular 7-Up bottler involved is, because of his exclusive territorial franchise, the only one distributing packaged 7-Up in his geographic area has enabled him to more strongly resist supermarket pressures for total conversion to one-way containers. Similarly, many grocery chains have pressed national brand bottlers for delivering cans to their central warehouses, which serve retail outlets over a geographical region spanning many territorial franchises. The territorial boundaries of national brand franchises have again impeded chain pressure for warehouse delivery, since "selling to a central warehouse is the equivalent of selling outside the bottler's specified territory" [176] in violation of his franchise contract.

For the above reasons, the operation of the exclusive territorial system in which national brand soft drink products are marketed has been the only impediment to an even faster swing to no-return containers. As Professor Hannon has observed, "[t]he only force opposing this centralizing tendency [toward regional distribution of one-way containers] is the franchising procedure used by the major beverage makers." [177] Thus, in 1970, approximately 60% of fran-

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[173] 1970 Hearings, at 18. The trend toward throw-away-packages has been brought about by a "[s]trong push by retailers and wholesalers, particularly supermarkets." Shih Study, at 40. See also Corplan Report, at 2, 20; and Prepared Statement of N. E. Norton, President of the Royal Crown-Dr Pepper Bottling Co., Corpus Christi, Texas, and President of the Crusade for a Cleaner Environment, submitted to the Senate Subcommittee on the Environment, March 6, 1972, at 10; Hannon, "Bottles/Cans/Energy," *Environment*, March 1972, at 12 (hereinafter "Hannon"); American Can Company Report, at 23; *Softdrinks*, March 1970, at 46–47.

[174] Darnay and Franklin, at 40–41.

[175] *Softdrinks*, July 1970, at 24–25.

[176] Trial Brief, at V–5.

[177] Hannon, at 14.

chised soft drinks were sold in returnable containers versus 45% for all packaged soft drinks.[178] Moreover, although only 66% of soft drinks sold in chain supermarkets were national brand soft drinks, 89% of returnables sold were national brands.[179]

The proposed cease and desist order, if implemented, will increase problems purportedly attributed to no-return containers. It will do so in two ways.

First, the removal of territorial restrictions on the area in which national brand bottlers may sell their products will greatly accelerate the swing to no-return containers. As Complaint Counsel point out in their Trial Brief (V–5 and 6), there may be some slight handling and delivery cost savings which food chain retailers and grocery cooperatives feel will be realized from central warehousing of soft drinks.[180] With the removal of territorial restrictions, national brand bottlers, competing against other bottlers of the same brand, will be forced to accede to chain demands for warehouse delivery or risk loss of substantial amounts of business they now conduct with these high-volume retail food outlets. This will accelerate the swing to throw-away packages since warehouse delivery is feasible only with no-return containers. Booz-Allen & Hamilton reported, after surveying 27 food chains, that:

"Warehouse delivery automatically implies conversion to one-way packages, as only one chain headquarters interviewed indicated a willingness to handle soft drinks in returnable bottles through its warehouse.

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"*The Major Reason for Desiring To Convert to Warehouse Delivery Is Elimination of the Cost and Inconvenience of Returnable Bottles.*

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"* * * conversion to one-way containers is mandatory if the warehouse delivery system is to be employed." [181]

If territorial restrictions are removed, there is a high likelihood of a relatively immediate nationwide shift to warehouse delivery for food chains and grocery cooperatives, bringing about almost total reliance on no-return containers by such stores.[182] The fear of losing these high-volume outlets entirely to neighboring national brand bottlers would overcome any existing bottler resistance based on higher distribution costs and loss of merchandising advantages that warehouse delivery entails.[183]

Since chain and other large food outlets typically account for a high percentage of a national brand bottler's sales, bottlers who convert entirely to one-way containers to service these high-volume accounts might quickly find that the operating cost of producing returnables solely for the remaining low-volume accounts is uneconomical. Accordingly, the end result of a shift to warehouse delivery might well be to eliminate the integrated production and distribution operations of many national brand bottlers who currently rely on both returnable and non-returnable containers. Thus, the ecological effect of the proposed cease and desist order could be an almost total conversion by the soft drink industry to non-returnable containers.

The FTC's proposed relief will also be detrimental to the public interest since it will result in elimination of a substantial part of a viable and natural distribution system capable of handling refunds on and collections of containers, whether it be for reuse or recycling. The local route distribution system relied on by many national brand bottlers is, as noted before, a double-handling system. Route trucks leave the bottling plant with bays loaded to less than capacity so as to be able to collect empties from retail outlets for return to the plan. No only do Complaint Counsel envision the replacement of this route distribution system by warehouse delivery, but they also foresee the elimination—

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178 As a further example, in 1966 89% of Coca-Cola products were sold in returnables, while only 77% of all soft drinks were sold in returnable bottles. *Printer's Ink*, April 28, 1967, at 14.

179 American Can Company Report, at 39. The other 11% were regional brands.

180 The Booz-Allen Study, at 9, reported that "one-third of all grocery chains and voluntary group headquarters surveyed indicated they intend to increase pressures on bottlers to convert to warehouse delivery."

181 Booz-Allen Study, at 9, 19–20.

182 See CMP Study, at 8, 33, 35.

183 Booz-Allen Study, at 14–15, 19–20. In addition, national brand bottlers who acquiesce in chains' demands for warehouse delivery are not likely to want to use returnable bottles for such accounts. Chains central warehouses service retail outlets in a geographic area spanning the territories of many bottlers of Coke, for example. A Coke bottler who shipped returnables to such central warehouses would risk losing substantial amounts of his investment since many of his bottles (costing 9–11¢ each) would undoubtedly be returned not to him but to the Coke bottler in whose area the drink was ultimately sold. See CMP Study, at 8,33.

through merger, sale or otherwise—of many national brand bottlers,[184] bottlers who have in many cases been actively engaged in their communities in establishing collection centers or cooperating in recycling efforts for no-return containers.

Thus, the proposed cease and desist order is likely to both accelerate the problem of no-return containers and destroy one of the existing viable systems capable of collecting such containers, either for reuse or recycling. Historically, the returnable system utilizing the local bottler has been one of society's most efficient recycling systems from a cost and energy conservation standpoint. It should be preserved.

A. *The Economic Milieu*

Around the turn of the century, soft drink companies were relatively small, local operations. No company or group of companies dominated the industry. If manufacturers of soft drink syrups were to distribute their products on a regional or nationwide basis, they needed local independent businessmen to produce the required capital for necessary plant, equipment and bottling supplies and to create a local market for trademarked soft drinks. In order to provide the necessary inducement for local entrepreneurs throughout the country to supply the necessary capital and make the required local effort to promote consumer acceptance of new soft drink products, exclusive territorial provisions were put in trademark licenses. In addition, territorial restrictions facilitated the licensor's maintenance of control over quality and uniformity of the common law trademarked product.

B. *The Legal Milieu*

At the time early soft drink franchise agreements were negotiated, there was a substantial amount of litigation between distributors and manufacturers in other industries over breaches of exclusive distributorships. Numerous suits had arisen out of direct competition by other distributors (e.g., *Russel v. Horn, Brannen & Forsyth Mfg. Co.*, 41 Neb. 567, 59 N.W. 901 (1894)). The legality of such exclusive representation agreements had been upheld under both the common law and the antitrust laws (e.g., *Newell v. Meyendorff*, 9 Mont. 254, 23 P. 333 (1890); *Locker v. American Tobacco Co.*, 218 F. 447 (2d Cir. 1914). There was a danger that unless soft drink bottlers were granted territorial protection to effectuate their exclusive representation agreements the syrup companies might be sued and held liable for permitting another bottler to invade their franchisees' exclusive territories (e.g., *W. G. Taylor Co. v. Bannerman*, 120 Wis. 189, 97 N.W. 918 (1904); *Mueller v. Bethesda Mineral Spring Co.*, 88 Mich. 390, 50 N.W. 319 (1891)). Without the use of territorial restrictions ancillary to the exclusive franchise granted, there was no effective way in many areas of the country of legally protecting against other franchised bottlers invading and depriving an exclusive franchisee of a portion of his market. The syrup companies could avoid the danger of liability for breach of contract on the ground that they allowed the exclusivity of their franchisees' territories to be subverted only by vertically imposing territorial restraints ancillary to the exclusive bottling contracts. The ancillary restrictions implemented the syrup companies contractual obligations and protected them from the potential exposure of claims from their exclusive franchisees. Such restraints were not only economically advantageous, but desirable to protect franchisors from potential liability.

Moreover, at the heart of a bottling franchise was the trademark license given the bottler franchisee to use the franchisor's trademark as directed in making a product in accordance with the franchisor's quality standards. What the syrup company had to sell was the right to use its valuable property rights in its common law trademark, which it had to protect and preserve to remain in business. Thus, by imposing territorial restrictions, the syrup companies could identify the source of packaged soft drinks and thereby better assure the maintenance of quality and uniformity in accordance with the trademark owner's duty to supervise and control the manner in which his marks are used.

Thus, territorial restrictions originally were vertically imposed by the syrup company franchisors, not to stifle competition and create a monopoly, but to develop a nationwide production and distribution system through incentives to local businessmen to enter into exclusive franchises for soft drink products and to vigorously promote such products. In addition, such territorial restrictions were intended to provide economic advantages to the syrup companies and to protect their trademark rights.

[184] See Trial Brief, at V–11, 12; VII–1, 2.

II. Territorial Restrictions in Soft Drink Trademark Licenses Have Judicially Been Held To Be Reasonable Ancillary Restraints of Trade

Although soft drink franchise agreements have contained vertically imposed territorial restrictions since the turn of the century, and these restrictions have long been a matter of public record, the government has not until now sought to have such restrictions declared invalid under the antitrust laws. However, the validity under the antitrust laws of territorial provisions in soft drink trademark licenses has been the subject of private litigation. It was first litigated over fifty years ago in a case brought by the predecessor of the "Thomas Companies"[185] against the Coca-Cola Company. *The Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 269 Fed. 796 (D. Del. 1920). The case involved an exclusive trademark license originally granted in 1899 by The Coca-Cola Company to J. B. Whitehead and B. F. Thomas, covering most of the United States, to bottle and vend Coca-Cola; Whitehead and Thomas assigned their rights to a corporation, Coca-Cola Bottling Co., which immediately established bottling plants in Atlanta and Chattanooga. With the consent of The Coca-Cola Co., a division of the territory was made with Coca-Cola Bottling Co. retaining the Chattanooga plant and certain territory, while the Atlanta plant and the remainder of the territory was acquired by he plaintiff, *The* Coca-Cola Bottling Co.,[186] who, with the consent of The Coca-Cola Co., in turn licensed 588 bottlers to manufacture and sell packaged Coca-Cola in exclusive territories throughout that part of the United States covered by the Thomas and Whitehead trademark license.

When The Coca-Cola Company sought to cancel its contract, arguing that it was terminable at will, The Coca-Cola Bottling Company took the position that its contract was perpetual in nature and brought suit to enjoin such cancellation and to obtain specific performance of the contract (269 Fed. at 799–801). The District Court denied a motion to dismiss the complaint and upheld the validity of the original license granted to Whitehead and Thomas. It rejected all arguments to the contrary advanced by The Coca-Cola Company, including the argument that the licensing arrangement was void under the Federal antitrust laws. (269 Fed. at 813–14.) In finding the territorial restrictions, among others, ancillary to a lawful agreement, it held that there was nothing in the contract "having an effect or intended to have an effect to defeat or lessen competition," and that nothing therein "may be said to be in unreasonable restraint of trade." (269 Fed. at 814.)

The Bureau of Competition now attempts to minimize this case by claiming that "the court did not consider the territorial restrictions in the individual bottler contracts but only . . . the agreement between Coca-Cola and the bottling company."[187] Even if true, the statement is irrelevant since the issue of the validity of territorial restraints is identical. Moreover, the statement is in error since the validity of the trademark licenses of the 588 bottlers was also put in issue. The Coca-Cola Co. suggested that The Coca-Cola Bottling Co. disposed of its rights under the 1899 contract by conveying to first line bottlers (referred to by the District Court as subbottlers) all of its rights to bottle and sell Coca-Cola in the defined territory. The District Court did not have to consider the question of whether the beneficial interest in the bottling contract retained by The Coca-Cola Bottling Co. after entering into the perpetual contracts with its subbottlers made it the "real party in interest" since it allowed several first line bottlers to intervene both on their own behalf and on behalf of all other bottlers who derived their rights to bottle Coca-Cola from the 1899 contract. (269 Fed. at 814–15.) The District Court then held that both the bottlers and the original plaintiffs were entitled to a permanent injunction protecing their property rights in their trademark licenses. The court stated that (269 Fed. at 815):

"Both The Coca-Cola Bottling Company *and the subbottlers* have an interest in the subject of the action and in obtaining the relief demanded by the bill of the complaint." (Emphasis supplied.)

While the case was pending on appeal in 1921, the parties entered into a contract settling the case which the District Court then embodied as the final decree in both cases.

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[185] Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., and Coca-Cola Bottling Works 3rd, Inc.

[186] Coca-Cola was also sued by Coca-Cola Bottling Co., since Coca-Cola attempted to terminate its contract as well.

[187] FTC Statement, Appendix A, at 8.

The decree in pertinent part provided that each bottler had a property right in the perpetual, unlimited, absolute and exclusive right to use the trademark Coca-Cola on bottled soft drinks within the territory designated in his contract. In fact, as recently as 1965, the Federal Trade Commission has itself cited with approval the 1920 decision of the District Court for the proposition that ancillary restraints of trade are lawful under the antitrust laws. *Matter of Carvel Corp.*, FTC Dkt. No. 8574 (July 19, 1965).

The validity of territorial restrictions in soft drink trademark licenses was also upheld in *Brosious* v. *Pepsi-Cola Co.*, 155 F.2d 99 (3d Cir. 1946), where the Court of Appeals affirmed a district court action dismissing a challenge under the Sherman Act to a Pepsi Cola exclusive bottling contract.

In summary, in those private actions where the validity of soft drink territorial restraints have been challenged under the antitrust laws, they have been upheld. Bottlers of all franchised brands have been able to rely on judicial approval of territorial trademark licenses under the antitrust laws. Despite the fact that such territorial restrictions in soft drink trademark licenses have been a matter of public record since the turn of the century, even before the creation of the Federal Trade Commission, their validity has not until now been challenged by the government in a public proceeding under the antitrust laws.

III. Territorial Restrictions in Soft Drink Trademark Licenses are not per se Illegal and Should be Lawful Under the Antitrust Laws

A. *Introduction*

Courts have traditionally utilized two approaches in evaluating trade practices alleged to be in violation of the antitrust laws. In evaluating the legality of most types of restraints alleged to be violative of the antitrust laws, the Courts have utilized the "rule of reason," read into the Sherman Act by *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60, 62 (1911) to promote the public interest. This approach requires an examination at trial of the facts peculiar to a particular business and the business justifications for the challenged restraint of trade. The classic rationale for the "rule of reason" was offered by Mr. Justice Brandeis for a unanimous court in *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918):

"[T]he legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; [and] . . . the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. . . . [K]nowledge of intent may help the court to interpret facts and to predict consequences."

The alternative approach, application of the rule of *per se* illegality, is applied in the case of certain restrictions, which because of "their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958). The *per se* rule of prohibition has been applied to trade practices, which by experience and analysis, the courts have found over the years to be utterly without justification, hence making a factual inquiry at trial into economic justifications for the impairment of competition irrelevant. (See *White Motor Co.* v. *United States*, 372 U.S. 253, 265–66 (1963) (Brennan, J. concurring)). Thus, it is generally only after "considerable experience with certain business relationships" which reveals them to be "naked restraints of trade with no purpose except stifling of competition" that the courts classify a practice as a *per se* violation of the antitrust laws. *United States* v. *Topco Associates*, 405 U.S. 596, 607–08 (1972); *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963).

B. *Soft Drink Territorial Restrictions Are Not Per Se Illegal*

The courts have traditionally drawn a distinction between vertical and horizontal market division.[190] Only in relatively recent times, beginning in 1949, has

[190] See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Topco Associates* 405 U.S. 596, 608 (1972); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 378–79 (1967).

the government seen fit to challenge as *per se* illegal vertically imposed territorial restraints such as are involved here.[191]

As the Supreme Court has recognized, "[b]ecause . . . [we have] distinguished between horizontal and vertical territorial limitations for purposes of the impact of the Sherman Act, it is first necessary to determine whether the territorial arrangements here are . . . the creature of the licensor . . . [or] the product of a horizontal arrangement among the licensees." *United States* v. *Sealy, Inc.*, 388 U.S. 350, 352 (1967).

As indicated earlier, the territorial restrictions in soft drink bottlers' contracts with syrup companies were vertically imposed territorial restraints ancillary to valid trademark licensing agreements. The restraints involved are *vertical* in the sense that they are agreements between persons at different levels of the market structure, *i.e.*, syrup companies and bottlers of packaged soft drinks, in contradistinction to horizontal agreements between competitors at the same level of the market structure allocating territories in order to minimize competition. Such ancillary restraints were not formally imposed by syrup companies to facilitate an inter-bottler agreement, but rather were imposed at different times and places by franchisors both for business advantage and to protect their trademarks.[192]

1. *Before Schwinn.*—The Supreme Court first considered the question of vertical territorial restrictions less than ten years ago in *White Motor Co.* v. *United States*, 372, United States 253, 261 (1963). In that case, a truck manufacturer was charged with imposing both territorial and customer restrictions upon its dealers and distributors in violation of Section 1 of the Sherman Act.

The District Court, applying the *per se* rule, enjoined the use of such restrictions. *United States* v. *White Motor Co.*, 194 F. Supp. 562, 564 (N.D. Ohio 1961). On appeal, the Supreme Court reversed, rejecting application of the *per se* rule to vertical restrictions, and refused to formulate a rule of law until after a trial had developed detailed evidence of the effects on competition of such vertical arrangements. (372 U.S. at 261). Mr. Justice Douglas, speaking for the Court, reasoned that it "knew too little of the actual impact" on competition or the "economic and business stuff out of which these arrangements emerge" to determine whether vertical restraints should be categorized as *per se* restrictions. (372 U.S. at 261, 263.)

Subsequently, applying a "rule of reason" analysis, the Sixth and Seventh Circuits upheld vertical territorial restrictions in two suits brought under Section 5 of the Federal Trade Commission Act. See *Snap-On Tools Corp.* v. *FTC*, 321 F.2d 825 (7th Cir. 1963); *Sandura Co.* v. *FTC*, 339 F.2d 847 (6th Cir. 1964). These cases reaffirmed the "rule of reason" approach to vertical territorial restrictions, rebutting anew the government's efforts to have such restrictions declared illegal *per se*. Nevertheless, the Solicitor General declined to seek certiorari in either case. Evidently, the facts developed in the full-evidentary hearings in these cases did not make them "suitable vehicles" to convince the Court to establish a rule of *per se* illegality.[193] Thus, the cases before *Schwinn* established without exception that vertical territorial restrictions were to be judged by the "rule of reason."

2. *Schwinn.*—In 1967, the Supreme Court introduced an element of confusion into the approach to be taken under the antitrust laws in passing on the legality of vertical territorial restrictions by virtue of its decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

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[191] See Hearings on H.R. 528, 2688, 6544 Before the Subcomm. on Automobile Marketing Legislation Before the House Comm. on Interstate and Foreign Commerce, 84th Cong., 1st Sess. 89, 362 (1955). "[D]uring the first 60 years of the Sherman Act, despite the widespread use of such restrictions, apparently not a single one was ever challenged by the Department of Justice." Pollock, *Franchising, Customer Restrictions and Building a Better Mousetrap*, 46 Chi. B. Rec. 378, 381 (1965).

[192] The mere fact that a few subsidiaries of syrup companies currently operate bottling plants in exclusive territories does not somehow transform the territorial franchise system into a horizontal market division (see FTC Statement, Appendix A, at 10–13). For example, The Coca-Cola Company acquired several franchises during the depression to insure the availability of Coca-Cola in those territories when several Coca-Cola bottlers were about to go out of business. There are various reasons why syrup companies purchased or established bottling operations, but none support the conclusion that the territorial franchise system was horizontally imposed. For a market division arrangement to be horizontal, the closed territorial network must be initiated by franchisees who prevail upon their franchisor to "impose" it on them. See *United States* v. *Sealy, Inc.*, 388 U.S. 350, 352–54 (1967); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608–10 (1972); *White Motor Co.* v. *United States*, 372 U.S. 253, 267 (1963) (Brennan, J. concurring); *Sandura Co.* v. *FTC*, 339 F.2d 847, 857–58 (6th Cir. 1964). The territorial provisions in soft drink trademark licenses, granted to hundreds of independent local businessmen over the years as the industry was born and developed, are clearly not the product of a horizontal arrangement among the franchisees.

[193] 5 Trade Reg. Rep. ¶ 50,264 at 55,584.

The Court held that Schwinn's vertically imposed restrictions limiting the customers to whom its distributors and retailers could resell products purchased from Schwinn violated the Sherman Act, but that under such Act Schwinn could limit distribution by its agents and consignees, where Schwinn had retained all indicia of ownership (including title, dominion, and risk of loss) with respect to its products.[104]

Schwinn is cited by the FTC staff as establishing a broad rule of *per se* illegality for all vertical territorial restrictions, including territorial restrictions in soft drink trademark licenses. While there is some language in Mr. Justice Fortas' opinion in *Schwinn* which can be so read, the Court makes clear early in its opinion that it analyzed the case under the rule of reason in the context of a complete factual record made in the District Court.

At the outset, Mr. Justice Fortas noted that (388 U.S. at 368):

"In this Court, the United States has abandoned its contention that the distribution limitations are illegal *per se*. Instead we are asked to consider these limitations in light of the 'rule of reason,' and, on the basis of the voluminous record below, to conclude that the limitations are the product of 'agreement' between Schwinn and its wholesale and retail distributors and that they constitute an unreasonable restraint of trade."

Later, Justice Fortas again noted (388 U.S. at 373) that "[t]he Government does not contend that a *per se* violation of the Sherman Act is presented by the practices which are involved in this appeal" and that "[a]ccordingly, we are remitted to an appraisal of the market impact of these practices." Subsequently, Justice Fortas emphasized that the Court "must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry" and that "[o]ur inquiry is whether . . . the effect upon competition in the marketplace is substantially adverse," citing in the two latter instances Mr. Justice Brandeis' classic formulation of the "rule of reason" in *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 238 (1918) (388 U.S. at 374–75). (*Supra*, pp. 87–88.)

3. *After Schwinn.*—Subsequently, various justices of the Supreme Court have interpreted *Schwinn* as a "rule of reason" case which did not establish a broad rule of *per se* illegality for all vertical territorial restrictions. Concurring in *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), Mr. Justice Douglas, who also concurred in *Schwinn*, noted that *Schwinn* was decided on the basis of the "economics of the bicycle business" in the context of a record which "elaborately sets forth information as to the total market interaction and interbrand competition, as well as the distribution programs and practices" there challenged. (390 U.S. at 155–156) Justice Douglas, adhering to his *White Motor* analysis, went on to note that the legality of exclusive territorial franchises in the newspaper distribution business would have to be tried as a factual issue and would depend on their impact on competition. (390 U.S. at 155–56.) Moreover, Justice Marshall, speaking for the Court in *United States* v. *Topco Associates*, 405 U.S. 596, 607–08 (1972), was careful to distinguish between vertical and horizontal territorial restrictions, only the latter of which were held to be *per se* violations of Section 1 of the Sherman Act.

Finally, Chief Justice Burger, dissenting in *Topco*, pointed out that in *Schwinn*, "the Court made it clear that it was proceeding under the 'rule of reason,' and not by *per se* rule." (405 U.S. at 617–18.)

Other courts have also interpreted *Schwinn* as not creating a broad *per se* rule prohibiting all vertical territorial restraints. (*E.g., Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968); *Anderson* v. *American Automobile Association*, 454 F.2d 1240 (9th Cir. 1972); *National Dairy Products Corp.* v. *Milk Drivers Local 680*, 308 F. Supp. 982 (S.D. N.Y. 1970); *Carter-Wallace, Inc.* v. *United States*, 440 F.2d 1374 (Ct. Cl. 1971); and *Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932 (3rd Cir.), cert. denied, 400 U.S. 831 (1970).

In any event, the vertical restrictions in the soft drink industry are clearly distinguishable from the vertical restraints found to be unlawful in *Schwinn*. *Schwinn* involved resale restrictions by distributors in bicycles, the finished products of the trademark owner, whereas the soft drink territorial franchises involve the use and application of the syrup companies' trademarks to packaged soft drinks manufactured by licensees. *Schwinn* did not involve a trademark

[104] The District Court had held that Schwinn's territorial restrictions on resale by distributors violated the Sherman Act, but Schwinn did not appeal this holding and thus those territorial restraints were not in issue before the Supreme Court. 388 U.S. at 367–68.

licensing arrangement where control of quality and uniformity of the product manufactured by the bottler licensee are deemed by law to be crucial to the protection of the mark,[195] but a significantly different factual situation. *Schwinn* was concerned with a trademarked product manufactured by the trademark owner and sold or consigned to its customers in completed form. In *Schwinn*, the manufacturer's dealers and distributors were simply reselling Schwinn's branded goods and not applying its trademark. To the contrary, trademark licensing always presents hazards to the mark's validity and calls for a degree of supervision and control which is unnecessary when the trademark is used exclusively by its owner, as in *Schwinn*, and applied by him to his own goods. Thus, quality control of the trademarked products was not an important factor in the *Schwinn* situation as it is in the soft drink business where the trademark owner sells an ingredient to its licensees which is used by them in preparation of the bottled soft drink sold under the licensed trademark. Obviously, in the latter case, where the trademarked owner does not itself complete the manufacture of the trademarked product, and particularly where the licensee is making a food product, quality control becomes not merely a significant but a vital consideration. Indeed, in gauging the reasonableness of restraints imposed in franchise agreements granting a trademark license, the decided cases have uniformly upheld the legality of reasonable territorial restraints ancillary to trademark licenses. The right, and indeed the duty, of a trademark owner to control and restrain its licensees in the uses of its trademarks was clearly enunciated in *Dension Mattress Factory* v. *Spring-Air Company*, 308 F. 2d 403 (5th Cir. 1962), where the court upheld vertical territorial restraints imposed by the owner of a trademark for mattresses on companies it licensed to use the mark on their own products manufactured in accordance with standards specified by the licensor. In rejecting plaintiff's claim that such restraints violated Section 1 of the Sherman Act, the court noted that division of territory was not the *central purpose* for such restraints, and held that such ancillary restraints were validly imposed to protect trademark rights.

As the Fifth Circuit recognized in the *Denison* case, unless the trademark owner is permitted to impose restraints needed to assure that his licensees will produce and market effectively a quality product, the value and validity of the trademark itself will be placed in jeopardy and possibly even lost. None of these considerations were important in *Schwinn* for the simple reason that *Schwinn* involved the sale and distribution of already completed goods. It was not a trademark licensing case and is not determinative of the lawfulness of restrictions ancillary to soft drink trademark licensing agreements.

C. Congress Should Enact Legislation Making Soft Drink Territorial Restrictions Lawful

For the reasons stated in the "Economic Analysis," we believe that vertical territorial restraints in soft drink trademark licenses will ultimately be found to be valid ancillary restraints of trade that are in all respects in the public interest. Such restraints promote interbrand competition, encourage the existence of small, independent businessmen, avoid wasted sales effort, promote an efficient allocation of society's resources, and arrest the trend, nurtured by chain supermarkets, toward greater use of no-return containers.

Economists, however, are divided as to the competitive effects of vertical territorial restrictions in general,[196] and in regard to vertical restrictions in the soft drink industry in particular.

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[195] Under the Lanham Act, a trademark owner must control the quality of the goods sold under his mark and must supervise its use to avoid the mark's losing its significance as an indication of origin. If he fails to exercise the necessary controls, the mark is subject to loss by abandonment. Lanham Act, 15 U.S.C. § 1127 (1962).

[196] Many commentators feel such restraints are a pro-competitive force in the economy. See, *c.g.*, Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards,* XXX Law & Contem. Prob. 506 (1965) ; Warren, *Economics of Closed-Territory Distribution,* 2 Antitrust L. & Econ. Rev. 111 (1968) ; Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* II, 75 Yale L. J. 373, 430–38 (1966). Professor Bork, for example, contends that vertical territorial restrictions allow a manufacturer to attract local distributors to invest their capital and promote his products through offering them exclusive territories, when he might not otherwise be able to finance such distribution efforts, thereby promoting interbrand competition. Bork also notes that in other industries, where the manufacturer is strong enough to have a choice between integrating vertically or relying on distributors, the alternative to exclusive territories may be further vertical integration to the detriment of small independent businessmen.

Also see *United States* v. *Arnold, Svhwinn & Co.*, 388 U.S. 365, 387 (Stewart, J., dissenting) ; Stachen, *Effect of Schwinn Bike on Territorial and Customer Restraints and Consignments: Will It Force Manufacturers Into Forward Integration,* 2 Conn. L. Rev. 383, 397 (1970) ; Keck, *Alternative Techniques in Controlling Distribution,* 37 Antitrust Bull. 177, 187 (1968) ; Simon, *Dual Distribution,* 37 Antitrust L. J. 168, 169 (1968) ;

It is appropriate, therefore, for Congress to consider the legislation before it relating to time-honored territorial restraints in the soft drink industry, particularly in view of the Supreme Court's recent recognition that longstanding industry practices should not be abruptly overturned.[197] The alternative is to subject the industry to years of uncertainty and doubt while the issue is litigated in the Commission and the Courts. Even in areas where it has applied the *per se* rule of illegality, the Supreme Court has strongly suggested the possibility of legislation to resolve complex economic issues. In *United States* v. *Topco Associates*, 405 U.S. 596 (1972), a case involving territorial restrictions in the food industry, the Court stated (405 U.S. at 611–612):

"If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision which must be made by Congress and not by private forces or by the courts. . . . To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected people is required."[198]

Such legislative deliberation is particularly appropriate with regard to soft drink territorial franchises. The inferences to be drawn from the economic facts are in dispute, and the economics of the industry complex. Yet the basic issue involves judgments clearly within the province of the Congress to make; namely, whether the soft drink territorial franchise system, built on a foundation of small, independent businesses, the route delivery system, emphasis on returnable bottles, and intense and growing interbrand competition, should be sacrificed in an attempt to promote intrabrand competition, which would ultimately transform the industry into a small number of regional bottlers relying on warehouse delivery and almost exclusive use of non-returnable containers.

CONCLUSION

The territorial franchise concept is an integral part of our free enterprise system. On the other hand, the staff's illusive quest for the benefits of intrabrand competition is just that, since intrabrand competition does not exist among food processors or their agents, to the best of our knowledge, for any of the thousands of brand name food products on the market today. The territorial system, however, has allowed small companies to grow into larger ones, enabled soft drinks to be widely dispensed in even the most remote areas at all times during the year, and supported intense and growing interbrand competition. The historical growth of the soft drink industry is testimony of the competitive attributes of the territorial franchise. As population patterns have changed, as transportation systems have developed, as technology in production has improved, some franchise boundaries drawn decades ago may need redefinition. The industry itself has been evolving to meet these changing demographic forces in our society. The fact, however, that a few existing franchises may by today's standards not be of optimal size does not support the condemnation of the whole territorial franchise system, which is adjusting to meet these problems. To the contrary, it is respectfully submitted that the proposed elimination of territorial restrictions in soft drink trademark licenses is clearly contrary to the public interest. It is detrimental to the consumer who will find higher prices for soft drinks; it is detrimental to the consumer who will find the availability of soft drinks in his local area much more limited and his choice of packages reduced. In terms of consumer utility, the elimination of territorial restrictions is of no benefit whatsoever.

In terms of the national interest in avoiding further economic concentration among large firms, the relief proposed by the FTC staff will accelerate the trend toward industry concentration in three areas. The small food retailer, the small bottler, and the small franchise company will all be handicapped, if not destroyed, because of the misguided efforts of the Federal Trade Commission. Backward integration by food chains into soft drink production and reduction

Remarks of Mary Gardner Jones, P.L.I. *Conference on Business and Legal Problems of the Franchise*, N.Y., N.Y., Sept. 28, 1968; Averill. *Sealy, Schwinn and Standard Oil: An Analysis and Prognosis*, 15 N.Y.L.F. 39, 63 (1969); McLaren, *Marketing Limitations on Independent Distributors and Dealers—Prices, Territories, Customer, and Handling of Competitive Products* 13 Antitrust Bull. 161, 184 (1968).

[197] See *Flood* v. *Kuhn*, —— U.S. ——, 40 L.W. 4747 (June 20, 1972).

[198] See also concurring opinion of Mr. Justice Blackman (405 U.S. at 612–13) and dissent of Chief Justice Burger (405 U.S. at 624).

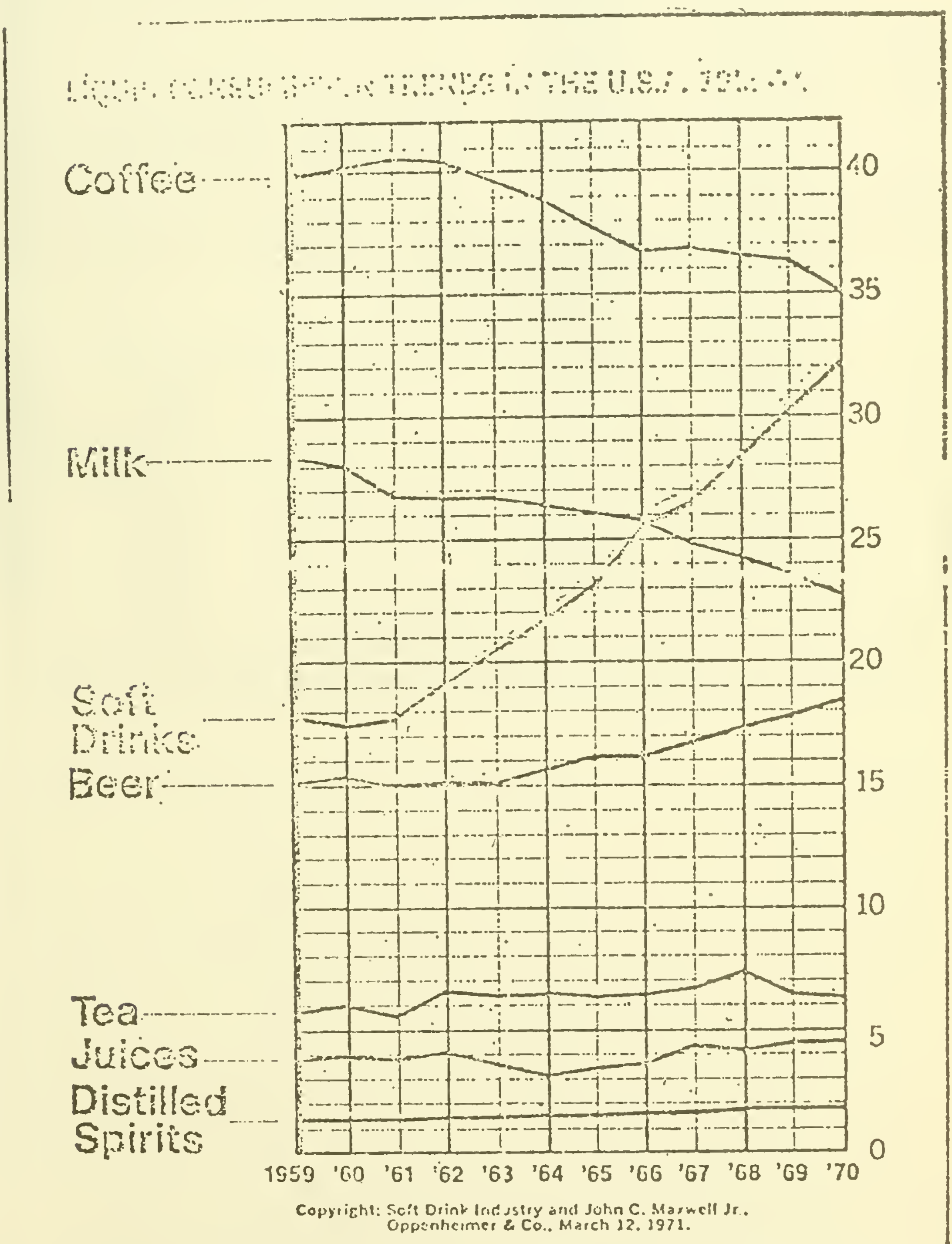
in the number of soft drink brands carried by chains and food wholesalers are also likely results of the shift to warehouse delivery resulting from the elimination of territorial restrictions. If this is the social cost of eliminating territorial restrictions, Congress should here and now prevent such costs from occurring.

Finally, the relief proposed by the Commission has been advocated in total disregard of the public interest in the environment. To remove territorial restrictions is to remove the returnable bottle. To remove the returnable bottle is to enhance many times over the increasing use of non-returnable containers. There is no public utility in this undertaking by the Federal Trade Commission. The public interest requires that the soft drink territorial franchises be protected.

Respectfully submitted.

NATIONAL SOFT DRINK ASSOCIATION.

EXHIBIT A



EXHIBITS

EXHIBIT B

LIQUID CONSUMPTION TRENDS IN THE UNITED STATES 1961-70

[Gallons per capita per year]

	1970	1969	1968	1967	1966	1965	1964	1963	1962	1961
Coffee	36.1	36.3	36.5	36.9	36.8	37.8	38.8	39.6	40.5	40.5
Soft drinks	32.2	30.2	28.6	26.5	25.5	23.1	21.7	20.4	19.1	17.8
Milk	25.0	25.3	25.6	25.3	25.9	26.0	25.9	25.8	25.6	25.6
Beer	18.4	17.8	17.3	16.8	16.1	16.1	15.6	15.1	15.2	15.0
Tea	6.2	6.5	7.3	6.8	6.4	6.3	6.6	6.3	6.6	5.6
Juices	4.8	4.4	4.1	4.4	3.7	3.5	3.2	3.6	4.1	3.8
Distilled spirits	1.8	1.8	1.7	1.6	1.6	1.5	1.4	1.4	1.4	1.3
Wine	1.3	1.2	1.1	1.0	1.0	1.0	1.0	0.9	0.9	0.9
Total	125.8	123.5	122.2	119.3	117.0	115.3	114.3	113.1	113.4	110.5
Daily per capita consumption, all liquids:										
Quarts per day	1.38	1.35	1.34	1.31	1.28	1.26	1.25	1.24	1.24	1.21
Input water consumption [1]	.62	.65	.66	.69	.72	.74	.75	.76	.76	.99
Total	2.00	2.00	2.00	2.00	2.00	2.00	2.00	2.00	2.00	2.00

[1] Includes all other beverages.

Sources: Beverage Industry; U.S. Dept. of Agriculture, Copyright: Beverage Industry and John C. Maxwell Jr., U.S Brewers Assn.; Maxwell reports, Oppenheimer & Co., Apr. 7, 1972.

EXHIBIT C

PER CAPITA CONSUMPTION

Year	Estimated million cases consumed	Gallons per capita
1970	4,400	32.2
1969	4,090	30.2
1968	3,830	28.6
1967	3,500	26.5
1966	3,300	25.5
1965	2,960	23.1
1964	2,750	21.7
1963	2,550	20.4

Source: Copyright: Soft Drink Industry and John C. Maxwell Jr., Oppenheimer & Co., June 18, 1971.

EXHIBIT D

ANNUAL SOFT DRINK SALES AND CONSUMPTION

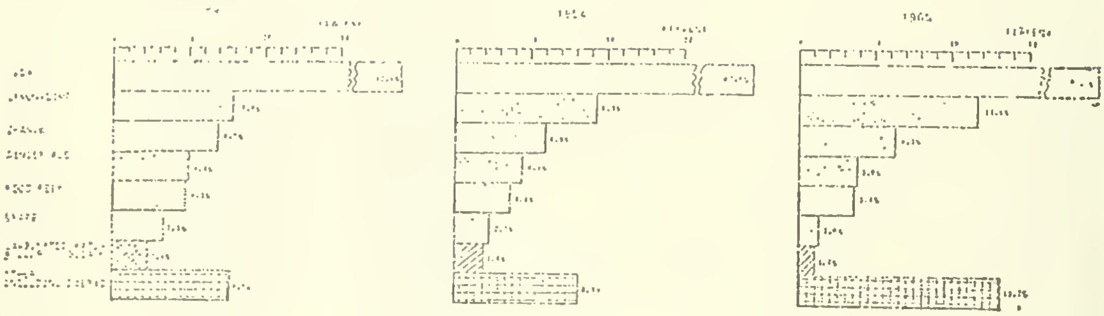
Year	Total value (wholesale)	Total cases (192 ounce)	Per capita (8-ounce containers)
1859	$1,415,000	2,830,000	2.2
1869	4,222,000	8,444,000	6.4
1879	4,742,000	9,484,000	4.5
1889	14,354,000	26,098,180	9.9
1899	23,269,000	38,781,660	12.2
1909	43,508,000	62,154,280	16.2
1919	135,341,000	169,176,200	38.4
1929	214,322,238	272,428,486	53.1
1935	159,939,553	196,859,084	37.1
1937	278,616,036	362,736,882	67.5
1938	311,713,267	411,774,461	75.4
1939	361,690,917	482,995,676	88.6
1940	4 1,699,200	550,400,000	100.1
1941	553,879,040	740,480,000	133.6
1942	526,185,088	703,456,000	126.2
1943	580,351,200	773,801,600	138.6
1944	629,681,100	812,491,700	147.1
1945	584,994,000	731,242,500	132.9
1946	617,168,600	771,460,800	132.3
1947	745,676,000	901,664,000	150.9
1948	835,157,300	1,009,863,700	164.4
1949	860,959,300	1,012,893,300	162.0
1950	876,532,600	1,001,751,474	158.0
1951	939,442,500	1,043,825,000	162.7
1952	1,019,295,000	1,132,550,000	174.0
1953	1,089,513,000	1,177,852,000	177.5
1954	1,166,605,000	1,176,674,000	174.2
1955	1,252,276,000	1,264,925,000	184.2
1956	1,308,000,000	1,321,214,000	188.9
1957	1,347,241,500	1,360,850,000	189.2
1958	1,427,463,500	1,359,489,000	186.4
1959	1,633,015,900	1,484,560,000	199.8
1960	1,698,025,600	1,476,544,000	192.0
1961	1,829,083,200	1,524,236,000	198.3
1962	2,001,016,800	1,667,514,000	213.4
1963	2,341,189,000	1,800,915,000	227.4
1964	2,533,167,000	1,948,590,000	242.9
1965	2,735,567,000	2,104,282,000	259.1
1966	3,175,980,000	2,352,587,000	287.0
1967	3,458,632,000	2,470,452,000	298.1
1968	4,165,552,000	2,777,035,000	331.6
1969	4,369,664,000	2,913,110,000	344.4
1970	4,799,784,000	3,096,635,000	362.8

Note: Sales expressed in cases of 24 8-ounce containers.

Source: National Soft Drink Association.

EXHIBIT E

5.1.1 FLAVOR MIX OF BOTTLED SOFT DRINKS, 1947, 1954, AND 1965



Source: Shih Study, at 37.

EXHIBIT F

SOFT-DRINK MARKET BY FLAVORS

[In percent]

Flavor	1964	1963	1958
Cola	62	60	53
Lemon-lime	16	15	10
Orange	8	9	5
Root beer	4	5	3
Other	10	11	29
Grand total	100	100	100

Source: Printers' Ink, Apr. 9, 1965, p. 23.

EXHIBIT G

ESTIMATED MARKET SHARE BY FLAVOR

[In percent]

Flavor category	1966	1967	1968	1969	1970
Cola (including diet)	62	63	63	63	63
Orange	10	11	13	13	13
Lemon-lime	12	11	10	10	10
Root beer	4	5	6	6	6
All others	12	10	8	8	8
Total	100	100	100	100	100

Source: 1971–72 SDI Annual Manual, at 18. Copyright: Soft Drink Industry and John C. Maxwell Jr., Oppenheimer & Co., June 18, 1971.

EXHIBIT H

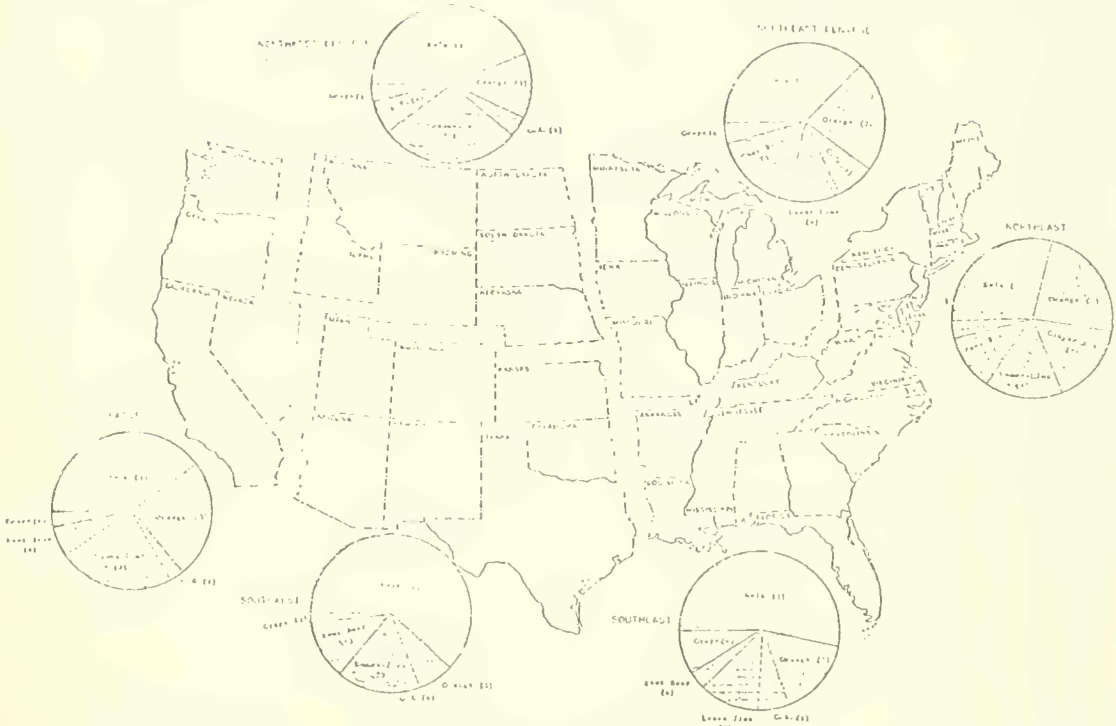
Flavor Preference Trends

	1955 Billion Units	1955 Percent	1960 Billion Units	1960 Percent	1965 Billion Units	1965 Percent	1970 Billion Units	1970 Percent
Cola	15.6	64.0	17.9	63.4	23.4	62.7	33.2	63.0
Lemon-Lime	2.0	8.3	2.7	9.3	4.1	11.0	5.3	10.0
Orange	1.5	6.0	1.3	6.3	2.4	6.5	3.6	6.8
Root Beer	.9	3.6	1.0	3.6	1.3	3.5	2.1	4.0
Ginger Ale	1.1	4.4	1.2	4.2	1.5	3.9	2.0	3.7
Grapefruit	.1	.3	.2	.7	.6	1.5	1.6	3.1
Grape	.6	2.6	.7	2.5	.8	2.3	.9	1.8
Mixers	.5	1.9	.5	1.8	.7	1.8	.9	1.7
All Others	2.1	8.6	2.3	8.2	2.5	6.7	3.1	5.9
TOTAL MARKET	24.4	100.0	28.3	100.0	37.3	100.0	52.7	100.0

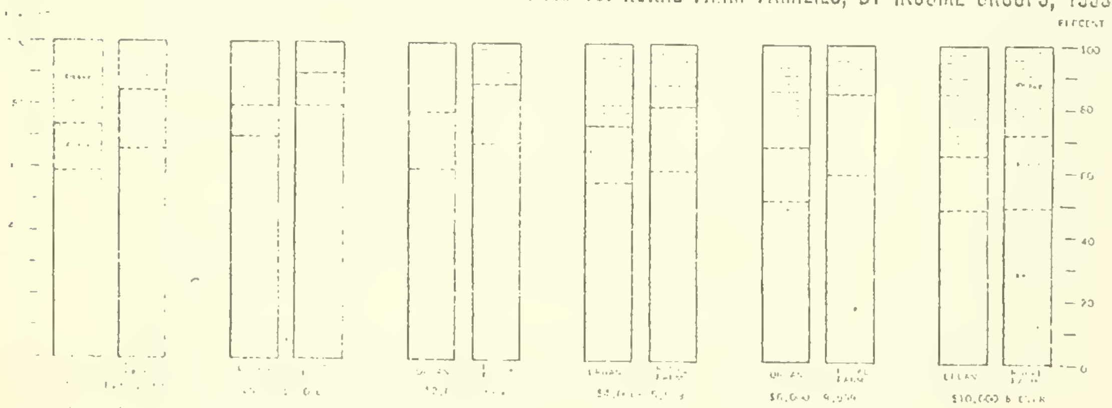
Source:
American Can Company Report, at 31.

EXHIBIT I

5.1.2 BEST SELLING SOFT DRINK FLAVORS, BY GEOGRAPHIC REGIONS,



5.1.3 SOFT DRINK FLAVOR PREFERENCES OF URBAN FAMILIES VS. RURAL FARM FAMILIES, BY INCOME GROUPS, 1955



37

Source: Shih Study, at 37.

EXHIBIT J

Regional Flavor Variations

	UNITED STATES	Northeast	Central	South	West
Cola	63.0%	49.6%	61.0%	[illegible]	[illegible]
Lemon-Lime	10.0	9.1	12.7	6.4	15.1
Orange	6.8	8.4	6.0	6.4	7.1
Root Beer	4.0	5.3	4.2	2.0	5.2
Ginger Ale	3.7	9.0	3.0	1.5	2.5
Grapefruit	3.1	3.3	4.6	1.3	3.9
Mixers	1.9	3.6	1.3	.9	[illegible]
All Others	7.5	11.7	7.2	6.4	6.5
TOTAL MARKET	100.0	100.0	100.0	100.0	100.0
(Billion 12-oz. Units)	(52.7)	(10.5)	(14.3)	(17.5)	[illegible]

Source: American Can Company Report, at 34.

EXHIBIT K

6.1 ESTIMATED DISTRIBUTION OF SOFT DRINK CONSUMPTION BY TYPE OF MARKETING CHANNELS, 1900, 1954 AND 1965

(CASES IN THOUSANDS)

CHANNELS	1900 CASES	1900 PERCENT OF TOTAL	1954 CASES	1954 PERCENT OF TOTAL	1965 CASES	1965 PERCENT OF TOTAL
	1	2	3	4	5	6
ALL CHANNELS	39,000	100.0	[illegible]	[illegible]	[illegible]	[illegible]
Home Consumption	11,700	30.0	[illegible]	[illegible]	[illegible]	[illegible]
Food Stores	780	2.0	[illegible]	[illegible]	[illegible]	[illegible]
Supermarkets	-	-	[illegible]	[illegible]	[illegible]	[illegible]
Independents	780	2.0	[illegible]	[illegible]	[illegible]	[illegible]
Package Stores	-	-	[illegible]	3.0	[illegible]	[illegible]
Drug Stores	390	1.0	11,767	1.0	[illegible]	[illegible]
Gasoline Service Stations	-	-	11,767	1.0	[illegible]	[illegible]
Home Delivery	10,530	27.0	[illegible]	4.0	[illegible]	[illegible]
Other	-	-	[illegible]	2.0	[illegible]	[illegible]
On-Premise Consumption	27,300	70.0	[illegible]	[illegible]	[illegible]	[illegible]
Vending Machines	-	-	[illegible]	[illegible]	[illegible]	[illegible]
Gasoline Service Stations	-	-	41,184	3.5	[illegible]	[illegible]
Institutions 1/	-	-	[illegible]	5.5	[illegible]	[illegible]
Industrial Plants	-	-	[illegible]	4.0	[illegible]	[illegible]
Recreational Outlets	-	-	35,300	3.0	[illegible]	[illegible]
Motels, Hotels	-	-	[illegible]	0.5	[illegible]	[illegible]
Other	-	-	[illegible]	1.5	[illegible]	[illegible]
Fountain	27,300	70.0	[illegible]	31.0	[illegible]	[illegible]
Motels, Hotels	1,560	4.0	[illegible]	3.5	[illegible]	[illegible]
Drinking Places	19,500	50.0	[illegible]	[illegible]	[illegible]	[illegible]
Eating Places	2,340	6.0	[illegible]	[illegible]	[illegible]	[illegible]
Recreational Outlets	[illegible]	8.0	[illegible]	5.5	[illegible]	[illegible]
Armed Forces Camps	780	2.0	[illegible]	[illegible]	[illegible]	[illegible]
Other	-	-	[illegible]	[illegible]	[illegible]	[illegible]

1/ INCLUDING HOSPITALS, SCHOOLS, OFFICE BUILDINGS, ETC.

SOURCE: U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS.

Source: Shih Study, at 116.

EXHIBIT L

DIRECTORY OF Franchise Companies

AMERICAN BEVERAGE CORP.

College Point, N.Y. 11356
(212) 886-5300
President: Selwyn Cohen
Senior Vice President: Saul Erdman
Executive Vice President: Benjamin Schrager
V.P. Sales: Michael Festa
V.P. Marketing: Harry Gold
V.P. Operations: Arthur Yellico
Vice President: Milton Myer
Franchised Plants: 11
Company-Owned Plants: 2
Locations of Company-Owned Plants: College Point, N.Y.; Brooklyn, N.Y.
Products: Hoffman Beverages; Dr. Brown's Beverages; Snow Peak
International Organization:
American Beverage Co., Inc.
117th St. & 15th Ave.
College Point, N.Y. 11356
(212) 886-5300
President: Selwyn Cohen
Franchise Director: Michael Festa
Franchised Plants: 2
Countries with Franchised Plants: 2

AMERICAN "76" CO.

3750 Oakton St.
Stokie, Ill. 60076
(312) 674-1776
Chairman: Mrs. Kay Fischer Odegard
President: Douglas B. Fischer
Senior Vice President: J. Soderholm
Franchise Manager: John Brodell
Advertising Director: John Brodell
Products: "76";
Low Calorie "76"; Plymouth Rock; Sun Valley, "Little Wonder"
International Organization:
American "76" International
President: Douglas B. Fischer
Vice President: John Brodell

APPLE-UP

(See Halfcase Inc.)

B-1 BEVERAGE CO.

912 Allen Ave.
St. Louis, Mo. 63104
(314) 772-6152
President: J. E. Lochhead
Products: B-1 Lemon Lime Soda; B-1 Sparkling Water

BARQ'S INC.

604 Lameuse St
Biloxi, Miss. 39530
(601) 432-5637
President: William A. Barq
Senior Vice President: William A. Barq
Franchise Manager: Jacinto B. Baltar
Advertising Director: William A. Barq
Products: Barq's Root Beer; Barq's Line of Flavors

BILLY BAXTER, INC.

60 East 42nd St.
New York, N.Y. 10017
(212) MU 7-3188
President: William F. Adler
Products: Billy Baxter line of beverages

BIRELEY'S DIVISION NATIONAL FLAVORS INC.

26 North Garden St.
Bensenville, Ill. 60106
(312) 766-1600
President: Nathan Bilger
Franchise Manager: Robert Woodcock
Advertising Director: John E. Evanson
Franchised Plants: 40
Products: Bireley's Orange; Cola; Root Beer; Strawberry; Grape; Lemon-Lime; Chocolate
International Organization:
Bireley's Export Division
National Flavors Inc.
1205 Central Bldg.
Pedder St.
Hong Kong
S-236057
Chairman: Donald Liederman
President: Nathan Bilger
Franchise Manager: Ken W. Burrie
Franchised Plants: 5
Countries with Franchised Plants: 5

BOTTLERS INTERNATIONAL, INC.

Box 200
Clearbrook, Va. 22624
(703) 662-7257
President: Mrs. Marjorie R. Gunter
Franchised Plants: 7
Products: Ho Ko; Glow Cola; Moonshine; Deri-Del Orange; Grape; Chocolate

BUBBLE UP CORP.

Suite 716, 408 South Spring St.
Los Angeles, Calif.
(213) 485-1079
President: Richard E. Ryan
Vice President: Charles J. Cook
General Manager: Henry H. Rubin
Franchised Plants: 150
Products: Lemon-Lime (Regular Bubble Up) and Lemon-Lime (Sugar-Free Bubble-Up)
International Organization: Suite 218 La Arcada Bldg., Santa Barbara, Cal. 93104
(805) 962-8411
President: Richard E. Ryan
Franchised Plants: 70
Number of Countries with Franchised Plants: 27

CANADA DRY CORP.

100 Park Ave.
New York, N.Y. 10017
(212) 532-4300
Chairman: David J. Mahoney
President & Chief Executive Officer World-wide Operations: James D. W. Blyth
U.S. Operations: 100 Park Ave., New York, N.Y. 10017
President: James D. W. Blyth
Franchised Plants: 165
Company-Owned Operations: 7
Three Regions: Eastern Vice President: Walter S. Red; Central Vice President: William P. Mechler; Western Vice President: Raymond L. Chipman
Products: Ginger Ale, Club Soda, Tonic (Quinine) Water, Collins Mixer, Vodka Mixer, Bitter Lemon, Whiskey Sour, Half and Half, Golden Ginger Ale, Vichy Water, Hi-Spot Lemon Soda, Wink (Grapefruit) Soda, Jamaica Cola, Sunripe Orange Soda, Concord Grape Soda, Wild Cherry Soda, Vanilla Cream Soda, California Strawberry Soda, Rooti Root Beer, Tahitian Treat, Cactus Cooler, Purple Passion, Birch Beer, Sport Cola, Viva, Sparkling Water, Coco Pina, Mineral Water Table Water, Kola Champagne, Spur Cola and Low Calorie: Ginger Ale, Lemon Soda, Pink Grapefruit, Cola, Orange Soda, Root Beer
Postmix Syrups: Ginger Ale, Wink, Collins Mixer, Tonic Water, Sport Cola, Cactus Cooler, Tahitian Treat, Rooti Root Beer, Cola, Orange, Cherry, Hi-Spot Lemon and Lemon Sour
Extracts: Orange, Cherry and Cola Flavors, Cream Soda, Root Beer Flavor, Club Soda Salts, Quinine Water Flavor, Fruit Punch Flavor, Ginger Ale Flavor, Grape Flavor, Lemon Flavor, and the following Low Calorie Flavors: Cola, Orange, Root Beer, Ginger Ale, Lemon and Grapefruit
Canada Dry International, Inc.
95 Wigmore St.
London W. 1, England
486-4347
President: Benjamin C. Davis
Franchised Bottlers: 160
Countries with Franchise Plants: 60
Canadian Organization:
Canada Dry Ltd.
2 Champagne Dr.
Downsview, Ont., Canada
416-633-9440
President: Norman L. Bosworth
Franchised Bottlers: 25
Company-Owned Operations: 5

(continued on page 118)

FRANCHISE DIRECTORY
(continued from page 117)

CAROLINA BEVERAGE CORP.
P.O. Box 1039
E. Klumac Rd. 1-85
Salisbury, N.C. 28144
(704) 636-2191
President: C.A. Peeler
Senior Vice President: R.C. Ritchie
Executive Vice President: W.L. Tatum
Franchise Manager: C.A. Peeler
Advertising Director: R.C. Ruhl
Franchised Plants: 14
Company-Owned Plants: 2
Locations of Company-Owned Plants: Salisbury, N.C.; Charlotte, N.C.
Products: Cheerwine; Caravan Dry Ginger Ale and flavors, Mo-Choc; Moonade

CHOC-OLA BOTTLERS, INC.
2301 Churchman Ave.
Indianapolis, Ind. 46203
(317) 787-7261
President: Harry Normington, Sr.
Products: Choc-Ola

CLICQUOT CLUB CO.
A NATIONAL INDUSTRIES CO.
197 Chatham St.
New Haven, Connecticut 06513
(203) 787-5991
Chairman: John J. Cott
President: Donald M. Smets
Vice President & Franchise Manager: George Martin
Advertising Director: Andrew P. Fiorillo
Franchised Plants: 74
Company-Owned Plants in U.S.: 1
Locations of Co-Owned Plants: Millis, Mass.
Products: Clicquot Club Beverages
International Organization:
Clicquot Club Co.
A National Industries Co.
197 Chatham St.
New Haven, Conn. 06513
(203) 787-5991
Chairman: John J. Cott
President: Donald M. Smets
Vice President & Franchise Manager: Kenneth Kelly
Franchised Plants: 3
Countries with Franchised Plants: 3

COCA-COLA USA
DIV. OF THE COCA-COLA CO.
P.O. Drawer 1734
Atlanta, Ga. 30301
(404) 875-3411
President: J. Lucian Smith
Marketing Director: Richard D. Harvey, Vice President
Brand Development Manager: Ira Herbert, Vice President
Coca-Cola Brand Manager: K.V.R. Dey
Group Product Manager, Fresca and Tab: Bruce Gilbert
Group Product Manager, Fanta, Sprite, Simba: D.P. Chamberlin
Bottler Sales Manager: Frank Spears, Vice President
Franchised Plants and Company-Owned Plants in U.S.: 867
Products: Coca-Cola; Sprite; Tab; Fresca; Fanta Flavors; Simba; Frozen Carbonated Beverages; Coca-Cola; Fanta Flavors; Sprite; Veep
International Organization:
The Coca-Cola Export Corp.
515 Madison Ave.
New York, N.Y.
(212) EL 5-5475
Chairman: James A. Farley
President: John Talley
Franchised Plants: 852
Countries with Franchised Plants: 135

COTT CORPORATION
A NATIONAL INDUSTRIES CO.
197 Chatham St.
New Haven, Conn. 06513
(203) 787-5991
Chairman: John J. Cott
President: John J. Cott
Vice President & Franchise Manager: George Martin
Advertising Director: Andrew P. Fiorillo
Franchised Plants: 350
Company-Owned Plants in U.S.: 10
Locations of Company-Owned Plants: New Haven, Conn.; Elizabeth, N.J.; New York, N.Y.; Braddock, Pa.; Somerville, Mass.; Millis, Mass.; Manchester, N.H.; Portland, Maine; Miami, Fla.; and Pawtucket, R.I.
Products: Cott Quality Sugar Beverages; Cott Quality Low Calorie Beverages; EnerGade
International Organization:
Cott Corporation
A National Industries Co.
197 Chatham St.
New Haven, Conn. 06513
(203) 787-5991
Chairman: John J. Cott
President: John J. Cott
Vice President & Franchise Manager: Kenneth M. Kelly
Franchised Plants: 78
Countries with Franchised Plants: 30

CREATIVE FLAVORS, INC.
187 Edgewood Avenue, S.E.
Atlanta, Georgia 30303
(404) 659-1016
Chairman: John W. Rymer
President: John W. Rymer
Executive Vice President: Thomas Peters
Number of Franchises in U.S.: 13
Products: Pop Kola, Southway flavor line (16 flavors plus specialty items), Tingle Flavors

CREME-O-COCO
4609 Gainsborough Ave.
Los Angeles, Calif. 90027
(213) 664-4035
President: Abe Kanner
Products: Creme-O-Coco
Franchised Plants: 43
Products: Goody Chocolate; Goody Orange; Goody Root Beer

CRUSH INTERNATIONAL, INC.
See also Hires Co., Sun-Drop
2201 Main Street
Evanston, Illinois
(312) DAvis 8-8850
Chairman: J.M. Thompson
President: Louis Collins
Vice President & General Manager: F.S. O'Donnell
Franchise Manager-V.P.: R.A. Poindexter
Franchised Plants: 300
Products: Orange-Crush, Diet Orange-Crush; Crush Flavors, Diet Crush Flavors; Old Colony Beverages
International Organization:
Inter-American Orange Crush Co.
2201 Main Street
Evanston, Illinois
(312) DAvis 8-8850
Chairman: J.M. Thompson
President: Louis Collins
Vice President Sales: J.R. McGowan
Franchised Plants: 300
Countries with Franchised Plants: 65

DAD'S ROOT BEER CO.
2800 N. Talman Ave.
Chicago, Ill. 60618
(312) IN 3-4600
President: Ely Klapman
Executive Vice President: Barney Berns
Franchise Manager: Roy Gurvey
Advertising Director: G.E. Kopald
Franchised Plants: 259
Company-Owned Plants: 1
Locations of Company-Owned Plants: Chicago, Ill.
Products: Dad's Root Beer; Diet Dad's Root Beer
International Organization:
Dad's Root Beer Co.
International Div.
2800 N. Talman Ave.
Chicago, Ill. 60618
(312) IN-3-4600
Sales Director: B. Berns
Franchised Plants: 35
Countries with Franchised Plants: 19

DAIRY HOUSE INC.
105 W. Adams St.
Chicago, Ill. 60603
(312) 332-4526
President: B.D. Kribben, Ph. D.
Franchise Manager: Eugene J. O'Neill, Jr.
Products: Kayo Chocolate Drink

DELAWARE PUNCH CO.
1619 N. San Marcos St.
San Antonio, Tex. 78201
(512) 733-8124
President: James D. Isaacks, Jr.
Vice President: Ben T. Bennett
Products: Delaware Punch

DIXI COLA CO.
6600 Whitestone Rd.
Baltimore, Maryland 21207
(301) 944-9410
President: E. Grivakis
Executive Vice President: J.R. Armstrong
Franchise Manager: J.R. Armstrong
Advertising Director: J.R. Armstrong
Franchised Plants: 39
Products: Dixi Cola, Diet Dixi Cola, Dixi Flavors
International Organization:
Dixi Cola Co.
6600 Whitestone Road
Baltimore, Maryland 21207
(301) 944-9410
President: E. Grivakis
Franchised Plants: 39
Countries with Franchised Plants: 7

THE DOUBLE-COLA CO. DIV. OF FAIRMONT FOODS CO.
3350 Broad St.
Chattanooga, Tenn. 37402
(615) 267-5691
General Manager: W.D. Downey

(continued on page 120)

FRANCHISE DIRECTORY

(continued from page 118)

Market Manager: W.E. Passow
Operation Manager: D.M. Chernovetz
Advertising Director & Product Manager: William Kilday
Franchised Plants: 150
Company-Owned Plants: 3
Locations of Company-Owned Plants: Memphis, Tenn.; Rome, Ga.; LaGrange, Ga.
Products: Double-Cola; Diet Double-Cola; Ski; Jumbo Flavors; Doble Double Dry Ginger Ale; Full Flavor Line of Frozen Carbonated Beverage Concentrates; Full Flavor Line of Frozen Non-Carbonated Beverage Syrups
International Organization:
The Double-Cola Co.
Div. of Fairmont Foods Co.
3350 Broad St.
Chattanooga, Tenn. 37402
(615) 267-5691
Franchised Plants: 45
Countries with Franchised Plants: 10

DR PEPPER CO.

5523 E. Mockingbird Lane
Dallas, Tex. 75222
(214) TA 4-0311
Chairman: H.S. Billingsley
President: W.W. Clements
VP-Administration: H.M. Browder
Vice President-Marketing: Joe K. Hughes
Franchised Plants: 510
Locations of Company-Owned Plants: Dallas, Tex.; Waco, Tex.; San Antonio, Tex.
Products: Dr Pepper; Diet Dr Pepper; Sugar Free Dr Pepper; Salute Beverages; Hustle

DR. WELLS, INC.

(See Flavette Corp.)

ECKES INTERNATIONAL DIVISION OF PETER ECKES

6501 Nieder-Olm
West Germany
Product: Apla

THE FLAVETTE CORP.

Subsidiary of Rheingold Corp., N.Y.
41 East 42nd St.
New York, N.Y. 10017
(212) 986-1060
President: Robert W. Beeler
Executive Vice President: Robert K. Rogers
Executive Director of Sales & Marketing: Allan Wikman, Jr.
Franchised Plants: 120
Products: Grapette, Orangette, Lemonette, Cherryette, Dr. Wells, Mr. Root Beer, Flavette Flavors, Old Red Eye
International Organization:
Grapette International, Inc.
P.O. Box 70
Camden, Ark. 71701
(501) 836-6316
President: R. Paul May
Franchised Plants: 92
Countries with Franchised Plants: 14

THE FOUR PERCENT CO.

11742 Grand River Ave.
Detroit, Mich. 48204
(313) 933-4249
President: Harold J Johnson
Company-Owned Plants: 1
Location of Company-Owned Plant: Detroit, Mich.
Products: Four Percent Beverages: complete line of fruit flavors

THE FROSTIE CO.

Haddon & Crestmont Avenues
Camden, N.J. 08103
(609) 966-3075
President: William T. Fessler
Vice President: Garwood Fisher
Marketing Director: Stephen Strassler
Sales Manager: Royce Hammond
Advertising Director: Kenneth Irving
Franchised Plants: 307
Products: Frostie Root Beer; Diet Frostie
Countries with Franchised Plants: 2

THE GOODY CO.

5656 West Raymond St.
Indianapolis, Ind. 46241
(317) 243-3521
Chairman: A.W. Noling
President: L.A. Enkema
Vice President: Harold Bateman
Franchise Manager: Harold Bateman
Advertising Director: Harold Bateman

THE GRAPETTE CO., INC.

(See Flavette Corp.)

THE GRAPICO CO. OF AMERICA

1931 Eleventh Ave. N.
Birmingham, Ala.
(205) 592-4969
President: J.M. Osborne
Products: Grapico, Orangico, New Yorker Flavors

HALFCASE, INC. APPLE-UP DIV.

3508 Greenville Ave.
Dallas, Tex. 75206
(214) 826-2260
President: Susan Wright
Vice President: Larry Turner
Secretary-Treasurer: Virginia Boehmer
General Manager: Ralph Boehmer
Product: Apple-Up

THE HIRES CO., DIV. BEVERAGES INTERNATIONAL, INC.

2201 Main Street
Evanston, Illinois
(312) DAvis 8-8850
Chairman: J.M. Thompson
President: Louis Collins
Vice President & General Manager: F.S. O'Donnell
Franchise Manager-V.P.: R.A. Poindexter
Franchised Plants: 255
Products: Hires Root Beer, Diet Hires Root Beer
International Organization:
Inter-American Orange-Crush Co.
2201 Main St.
Evanston, Ill.
(312) DAvis 8-8850
Chairman: J.M. Thompson
President: Louis Collins
Vice President Sales: J.R. McGowan
Franchised Plants: 47
Countries with Franchised Plants: 8

JU-C-ORANGE OF AMERICA

406 Broad St.
Lebanon, Pa.
(717) 272-1631
Chairman: Irwin G. Krim
President: Nathan B. Krim
Products: Ju-C-Orange; Pennsylvania Dutch Birch Beer
International Organization:
Krim Enterprises
(717) 273-4031
President: Irwin G. Krim
Products: Ju'cy Orange; Spritzer

THE JULEP CO.

5664 W. Raymond St.
Indianapolis, Ind. 46241
(314) 772-5254
Chairman: A.W. Noling
President: L.A. Enkema
Senior Vice President: L.J. Noling
Franchise Manager: Harold Bateman
Advertising Director: Harold Bateman

V & E KOHNSTAMM INC.

116 Nassau St.
Brooklyn, N.Y. 11201
(212) 624-3980
President: E.J. Kohnstamm
Franchise Manager: Lee Kohnstamm
Products: Eton; Pale Dry; Club Soda; Quinine; America Dry; Cue Flavors; Pale Dry and all flavors
International Organization:
V & E Kohnstamm Inc.
President: E.J. Kohnstamm
Franchise Manager: Lee Kohnstamm

A.J. LEHMAN CO.

912 Sycamore St.
Cincinnati, Ohio 45202
(513) 241-2166
Chairman: Philip Steiner
President: Albert Steiner
Franchise Manager: Benjamin Pritz
Advertising Director: Benjamin Pritz
Products: Tom Collins Jr.; Lemmy; Ironbeer

LONDON DRY, LTD.

2543 Deans Bridge Rd.
P.O. Box 3485
Augusta, Ga. 30904
(404) 736-2503
Chairman of the Board: Kenneth Cribb
President: Robert L. Rhodes, Jr.
Products: London Dry Ginger Ale; Soda; Tonic; Bitter Lemon; Lemon-Lime; Collins Mix; Grapefruit; White Lightnin'; Artic Mist; London Dry Cola; London Dry Grape; London Dry Orange

LOTTA COLA, CO.

7500 Melrose Street
Pittsburgh, Pa. 15218
(412) 351-0100
General Manager: R.M. Elster
Products: Lotta Cola

LUCKY CLUB CO.

3224 S. Kings Highway
St. Louis, Mo. 63139
(314) PR 2-5254
President: Glenn Sedgwick
Products: Lucky Club Cola

(continued on page 124)

FRANCHISE DIRECTORY
(Continued from page 120)

MA'S OLD FASHION, INC.
Laird St. & Rte #315
Wilkes-Barre, Pa. 18701
(717) 822-3731
Chairman: Issac Rothstein
President: Isaac Rothstein
Vice Presidents: William Gelb, Irving E. Davis
Franchise Manager: William Gelb
Franchised Plants: 67
Company-Owned Plants: 1
Location of Company Owned Plant: Wilkes-Barre, Pa.
Products: Ma's Old Fashion Root Beer; Ma's Cola; Ma's Flavors (sugar and low calorie); Dietetic Ma's Root Beer

MASON & MASON, INC.
7383 North Rogers Ave.
Chicago, Ill 60626
(312) 465-2870
Chairman: Jerry Albert
President: Ralph E. Mason
Senior Vice President Marketing: Fred F. Drucker
Advertising Director: Fred F. Drucker
Franchised Plants: 172
Products: Mason's Root Beer

MISSION OF CALIFORNIA A NATIONAL INDUSTRIES CO.
197 Chatham Street
New Haven, Conn. 06513
(203) 562-5142
Chairman: John J. Cott
President: John A. Sanders
Franchise Manager: John A Sanders
Advertising Director: Andrew P. Fiorillo
Franchised Plants: 182
Products: Mission Beverages; Big Giant Cula; Quiky
International Organization:
Mission Beverages International
A Subsidiary of Mission of California Inc.
A National Industries Co.
197 Chatham St.
New Haven, Conn. 06513
(203) 562-5142
Chairman: John J. Cott
President: John A. Sanders
Vice President & Franchise Manager: Kenneth M. Kelley
Franchised Plants: 71
Countries with Franchised Plants: 30

MOOO CHO BEVS. & PARK BEVS.
Jobstown, N.J. 08041
(609) 723-1133
President: Joseph Woznica
Company-Owned Plant: 1
Products: Mooo Cho

MOXIE-MONARCH-NUGRAPE CO.
3742 Northeast Freeway
Doraville, Ga. 30040
(404) 451-6133
President: Frank A. Armstrong
Executive Vice President: George R. Dixon
Vice President-International & Corporate Development: Lionel H. Stutz
Vice President-Marketing: Roy Q. Threatt
Vice President-Production & Product Development: Miles E. Hess
Advertising Manager: Johnny Wilson
Treasurer: Arthur Lisker
Franchised Plants: 900
Products: Kist; Chocolate Soldier; Brownie; Moxie; NuGrape; Sun Crest; Sweet 'N' Low
International Organization:
Moxie Monarch-NuGrape Co.
3742 Northeast Freeway
Doraville, Ga. 30040
(404) 451-6133
President: Frank A. Armstrong
Franchised Plants: 75
Countries with Franchised Plants: 30

NATIONAL FRUIT FLAVOR CO., INC.
421 Girod St.
New Orleans, La. 70130
(504) 529-1122
President: Adam C. Gambel
Executive Vice President: A.P. Alexander, Jr.
Franchise Manager: A P. Alexander, Jr.
Franchised Plants: 8
Company-Owned Plants: 1
Products: Squeeze and National Flavors; Extracts and Emulsions

NESBITT FOOD PRODUCTS, INC.
2946 E. 11th St.
Los Angeles, Cal. 90023
(213) 263-7143
President and Chairman: Lee H. Grayson
Vice President-Sales: Frank Navajas
Director Market Development: H.E. Jennings
Franchised Plants: 300
Products: Nesbitt's orange & flavors
International Organization:
Nesbitt's Western International, Inc.
c/o Nesbitt Food Products, Inc.
2946 E. 11th St.
Los Angeles, Calif. 90023
(213) 263-7143
President and Chairman: Lee H. Grayson
Vice President & General Manager: Frank Navajas
Franchised Plants: 82
Countries with Franchised Plants: 9

NEW YORK AMER. BEV. CO., INC.
(See American Beverage Co., Inc.)

NO-CAL CORP.
921 Flushing Ave.
Brooklyn, N.Y. 11206
(212) 456-6000
Chairman: Morris Kirsch
President: David A. Kirsch
Executive Vice President: Lee R. Kirsch
National Sales Manager: Howard Wax
Advertising Director: Gloria Rosdal
Assistant Marketing Director: Paul Orecchia
Franchise Development Manager: Joseph Larossi
Franchised Plants: 40
Company-Owned Plants: 1
Location of Company-Owned Plants: New York City
Products: No-Cal; Lo-Cal
International Organization:
No-Cal Corp.
921 Flushing Ave.
Brooklyn, N Y. 11206
(212) 456-6000
Chairman: Morris Kirsch
President: David A. Kirsch
Franchised Plants: 40
Countries with Franchised Plants: 3

PENNSYLVANIA DUTCH BIRCH BEER, INC.
National Sales Office:
7104 Chestnut St.
Upper Darby, Pa. 19082
(215) 528-5244
Sales Manager: John A. Byrne
Franchise: Pennsylvania Dutch Birch Beer.

PEPSI-COLA CO.
Purchase, New York
(914) 253-2000
President: Victor A. Bonomo
Franchise Manager: Gaynor J. Ryan
Advertising-Merchandising Vice President: John Sculley III
Franchised Plants: 468
Company-Owned Plants: 21
Locations of Company-Owned Plants: Allston, Mass.; Milwaukee, Wis.; Phoenix, Ariz.; St. Louis, Mo.; Houston, Tex.; Las Vegas, Nev.; Bronx, Brooklyn, Long Island City, Mt. Vernon, N.Y.; Jersey City, North Brunswick, Teterboro, N.J.; Philadelphia, McKees Rock, Pa.; Dearborn Heights, Detroit, Flint, Grand Rapids, Mich.
Products: Pepsi-Cola, Diet Pepsi-Cola; Teem; Mountain Dew; Patio Flavors
International Organization:
PepsiCo International
Purchase,
New York
(914) 253-2000
President: Peter K. Warren
Franchised Plants: 512
Countries with Franchised Plants: 114

THE PERFECTION CO. LTD.
211 S. Fifth St.
P.O. Box 204
Waco, Texas
(817) 752-6291
General Partners: Marshall L. Saunders and R.T. Roark
Franchise Manager: Marshall L. Saunders
Advertising Director: Gilbert A. Beach
Products: Big-Red; Sun-Tang; Jack-Pot; Spizz

"QUE" TONIC CO.
229 E. Euclid
Princeton, Ill.
(815) 879-3532
President: S.E. Cassidy
Franchise Manager: S.E. Cassidy
Products: "Q" Tonic; Witesoda; Tart

THE QUENCH CO., INC.
1962 1st Ave. S.
Seattle, Washington 98103
(206) 624-4444
Chairman: S.S. Eland
President: S.S. Eland
Senior Vice President: S.W. Eland
Franchise Manager: G.E. Kennedy
Advertising and Sales Manager: Lyle Kier
Franchised Plants: 58
Products: Quench; Diet Quench; Honey Dew

RED ROCK CORP.
5698 W. Raymond St.
Indianapolis, Ind. 46241
(317) 243-3521
Chairman: A.W. Noling
President: L.A. Enkema
Senior Vice President: L.J. Noling
Franchise Manager: Harold Bateman
Advertising Director: Harold Bateman
Products: Red Rock Cola; Hep; Red Rock Flavors

RICHARDSON CORP.
1069 Lyell Ave.
Rochester, N Y. 14606
(716) 254-8822
President: M.A. Cleveland

(Continued on page 126)

FRANCHISE DIRECTORY

(continued from page 124)

Vice President-Finance: W.F. Farrell
Vice President-Marketing: J.F. Lorch
National Sales Manager: C. Dennison
Products: Root Beer, Beverage Syrups, Chocolate Products, Toppings, Flavors

ROYAL CROWN COLA CO.

P.O. Box 1440
1000 10th Ave.
Columbus, Ga. 31902
(404) 322-4431
Chairman: William T. Young
President: William C. Durkee
Vice President-Sales: M.G. Wolfe
Director-Brand Management: Donald C. Cole
Brand Managers: J. Pat Hitt, G.S. Stetenhagens, Carroll Dillingham
News Bureau Manager: David Hart
Franchised Plants: 360
Company-Owned Plants: 9
Locations of Company-Owned Plants: Oakland, Cal.; Orlando, Fla.; Columbus, Ga.; Greenville, N.C.; Salt Lake City, Utah; Richmond, Va.; Miami, Fla.; Tampa, Fla.; Jacksonville, Fla.
Products: Royal Crown Cola, Diet Rite Beverages, Cola; Sugar Free RC; Lemon-Lime; Ginger Ale, Grape, Orange, Root Beer, Strawberry, Imitation Black Cherry, Gatorade Cola; Gatorade Citrus; Nehi Beverages; Grape, Strawberry, Cherry, Lemon, Ginger Beer, Golden Ginger Ale, Chocolate, Grapefruit, KC Cola, Orange, Pineapple, Lime, Birch Beer, Bounce, Cream, Fruite Punch, Jubilee Grape, Jubilee Orange, Grape Punch, Grapefruit Pineapple, Jubilee Lemon, Lemon Sour, Lime Lemon, Luau, Orange Golden, Orange Pineapple, Monkey, Peach, Rock & Rye, Red, Root Beer, Vanilla, Cola, Raspberry; Par-T-Pak Beverages; Dry Ginger Ale, Bitter Lemon, Tom Collins, Lime Rickey, Cherry, Sparkling Sour, Grapefruit Sour, Whiskey Sour, Quinine Water, Club Soda, Grapefruit, Sarsaparilla, Sparkling Water, Rums Dry Ginger Ale; Upper 10; Kick; Lift; Fruit Beer; RC With A Twist of Lemon
International Organization:
Royal Crown Cola International
P.O. Box 1440
1000 10th Ave.
Columbus, Ga.
(404) 322-4431
President: Reginald A. Sinclair
Franchised Plants: 40
Countries with Franchised Plants: 26

SALIENT FLAVORING CORP.

48-25 Metropolitan Ave.
Brooklyn, N.Y. 11237
(212) 386-0302
Secretary: Harry Jackness
President: Joseph Greenberg
Vice President: Nathan Jackness
Franchise Manager: Harry Jackness
Franchised Plants: 14
Products: Nifty-Cavalcade; Jovo; Jack Frost

SCHWEPPES (USA) LTD.

Schweppes House
1200 High Ridge Rd.
Stamford, Conn. 06905
(203) 329-0911
Chairman: Cdr. Edward Whitehead, C.B.E.
President: Robert E. Ix
Executive Vice President: J. Anthony Yendell
Franchise Manager: John Rawson
Advertising Vice President: F.C. Noyes
Franchised Plants: 70
Products: Schweppes Tonic; Bitter Lemon; Bitter Orange; Ginger Ale; Club Soda, Ginger Beer; Collins Mixer
International Organization:
Cadbury Schweppes Ltd
Schweppes House, Connaught Place
London W.2
Ambassadur 1212
Executive Chairman: Rt. Hon. Viscount Watkinson, P.C., C.H.
Managing Director: G.A.H. Cadbury
Franchised Plants: 120
Countries with Franchised Plants: 32

THE SEVEN-UP CO.

121 South Meramec Ave.
St. Louis, Mo. 63105
(314) VO 3-7777
Chairman: H.C. Grigg
President and Chief Executive Officer: Ben H. Wells
Executive Vice President: Howard E. Ridgway
Marketing Director: William E. Winter
Franchise Manager: Robert W. Simpson
Advertising Director: Orville Roesch
Franchised Plants: 474
Prdducts: 7UP; Diet 7Up; Howdy Flavors
International Organization:
Seven-Up Export Corp., Ltd.
60 Broad St.
New York, N.Y. 10004
(212) HA 5-9077
Chairman: Howard E. Ridgway
President: Leslie R. Scott
Franchised Plants: 152 (excluding Canada)
Countries with Franchised Plants: 69 (excluding Canada)

THE SQUIRT CO.

4610 Van Nuys Blvd.
Sherman Oaks, Cal. 91403
(213) 789-8121
Chairman: H.B. Bishop
President: H.B. Bishop
Executive Vice President: Ernest L. Lowry
Franchise Manager: Ernest L. Lowry
Advertising Director: Hugh McKellar
Franchised Plants: 317
Products: Squirt; Diet Squirt
International Organization:
The Squirt Co.
4610 Van Nuys Blvd.
Sherman Oaks, Cal. 91403
(213) 789-8121
Chairman: H.B. Bishop
President: H.B. Bishop
Franchised Plants: 39
Countries with Franchised Plants: 8
Note: Although international organization headquarters are in Sherman Oaks, Cal., Squirt maintains affiliated office at Squirt of Canada, Stratford, Ontario, and Mexico City.

SUN-DROP DIV. GINI INTERNATIONAL LTD.

2201 Main St.
Evanston, Ill.
(312) 328-8850
Chairman: J.M. Thompson
President: Louis Collins
Vice President & General Manager: F.S. O'Donnell
Franchise Manager: Charles J. Neubauer
Advertising Director: Don Koerlin
Franchise Plants: 100
Products: Sun-drop; Sun-drop Golden Cola; Sun-drop Golden Goodness; Diet Sun-drop; Diet Sun-drop Golden Cola; Diet Sun drop Golden Goodness

SUN RISE INC.

407 Main St.
Marshall, Minn. 56258
(507) 532-4948
President: John C. Kreger
Senior Vice President: William Schmidt
Franchised Plants: 226
Products: Sun Rise Flavors

TRIPLE XXX CORP.

109 8th Street
P.O. Box 40
Orange, Texas 77631
(713) 883-2113
President: W.B. Hilliard
Products: Triple XXX Root Beer; Triple XXX Flavors

THE TRU-ADE CO.

123 E. 54th St.
New York, N.Y. 10022
(212) 832-7205
Chairman: Lee C. Ward
President: Lee C. Ward, Jr.
Executive Vice President: Lee C. Ward, Jr
Vice President: Gene L. Nelson
Franchise Manager: Lee C. Ward, Jr.
Advertising Director: E.E. Spitzer, Inc.
Franchised Plants: 75
Products: Tru-Ade; Tru-Ade Grape; Pal

UPTOWN EASTERN SALES, INC.

757 Third Ave.
New York, N.Y. 10017
(212) HA 1-4666
President: Morton M. Klein
Franchised Plants: 23
Products: Uptown

VERNORS, INC.

4501 Woodward Ave.
Detroit, Mich. 48201
(313) 833-8500
President: Walter J. Voss
Vice President-Marketing: Richard A. Tralas
Advertising Manager: C.E. Bentley
Products: Vernors; Vernors 1-Calorie
Franchised Plants: 62
Company-Owned Plants: 2
Locations of Company-Owned Plants: Detroit, Mich.; Toledo, Ohio

VESS BEVERAGE CO.

5020 Arsenal St.
St. Louis, Mo. 63139
(314) PR 3-6770
Chairman: Leroy O. Schneeberger
President: L.C. Crook

(continued on page 127)

FRANCHISE DIRECTORY
(continued from page 126)

Vice President: Barry S. Hargis
Franchise Manager: L.C. Crook
Advertising Director: L.C. Crook
Company-Owned Plants: 1
Products: Vess Draf Style Root Beer; Vess Billion Bubble Beverages; Whistle

VIRGINIA DARE EXTR. CO., INC.
822 Third Ave.
Brooklyn, N.Y. 11232
(212) 788-1776
President: Howard Smith
Executive Vice President: H.A. Kellerhals
Advertising Director: William J. Shearer
Franchised Plants: 50
Products: Korker; Slender; Virginia Dare

WHITE ROCK CORP.
215 Van Dyke St.
Brooklyn, N.Y.
(212) 625-0300
President: Alfred Y. Morgan
Vice Presidents: Martin Killeen, Henri Cote, Alfred Y. Morgan, Jr.
Franchise Manager: Alfred Y. Morgan
Advertising Director: Alfred Y. Morgan, Jr.
Company-Owned Plants: 3
Locations of Company-Owned Plants: Brooklyn, N.Y.; Waukesha, Wis.; Boston, Mass.
Products: Complete line of White Rock Beverages; Sioux City Sarsaparilla

WONDER ORANGE CO.
5600 W. Raymond St.
Indianapolis, Ind. 46241
(317) 243-3521
Chairman: A.W. Noling
President: L.A. Enkema
Executive Vice President: Harold Bateman
Franchise Manager: Harold Bateman
Advertising Director: W. Hines
Products: Rummy; Wonder Orange

YOO-HOO BEVERAGE CO.
600 Commercial Ave.
Carlstadt, N.J. 07072
(201) 933-0070
Chairman and President: Dr. Max A. Geller
Executive Vice President: Robert Zlotoff
Treasurer: A.M. Raboy
Vice President-Quality Control & Research: Dr. Eric B. Rotelling
Vice President-Marketing: L.S. Saylor
National Sales Manager: H.D. Smith
Franchise Managers: Frank Healey, Richard Glendenning
Company-Owned Plants: 5
Locations of Company-Owned Plants: Carlstadt, N.J.; Baltimore, Md.; Hialeah, Fla.; Bronx, N.Y.; Mt. Horeb, Wisc.
Products: Yoo-Hoo Chocolate Drink; Strawberry; Devil Shake Chocolate Drink; Mr. Energy High Energy Protein Drink; Cantrell and Cochrane Carbonated Beverages; Nedicks Carbonated Beverages
International Organization:
Yoo-Hoo Chocolate Beverage Corp.
Chairman and President: Dr. Max A. Geller
Senior Vice President: Dr. Eric B. Hotelling
Franchised Plants: 12

constraints imposed on each of these companies by its market, it would be unsafe to draw conclusions as to which is most efficiently organized. More measurements are needed to make that comparison.

EXHIBIT M

Brand Names

BRAND NAME	FRANCHISE COMPANY
Apla	Eckes International
Apple Up	Halfcase, Inc.
Artic Mist	London Dry
B-1	B-1 Beverage
Barq's	Barq's
Big Giant Cola	Mission of California
Big Red	Perfection Co.
Billy Baxter	Billy Baxter
Birch Beer	Canada Dry
Birch Beer	Royal Crown
Bireley's Flavors	Bireley's Div., Nat'l Flavors Inc.
Bounce	Royal Crown
Brownie Chocolate	Moxie-Monarch-NuGrape
Bubble Up	Bubble Up
Cactus Cooler	Canada Dry
California Strawberry Soda	Canada Dry
Canada Dry Ginger Ale & Low Calorie Ginger Ale	Canada Dry
Cantrell & Cochrane	Yoo-Hoo
Caravan Dry Ginger Ale	Carolina Beverage
Cheerwine	Carolina Beverage
Cherryette	Flavette
Choc-Ola	Choc-Ola
Chocolate Solider	Moxie-Monarch-NuGrape
Clicquot Club	Clicquot Club, Div. Nat'l Industries
Coca-Cola	Coca-Cola
Coco Pina	Canada Dry
Cott	Cott
Creme-O-Coco	Creme-O-Coco
Crush Flavors, Diet Crush Flavors	Crush Intl.
Cue	V & E Kohnstamm
Dad's Root Beer, Diet Dad's Root Beer	Dad's Root Beer
Delaware Punch	Delaware Punch
Deri-Del	Bottlers International
Devil Shake	Yoo-Hoo
Diet Rite	Royal Crown Cola
Dixi Cola	Dixi Cola
Double-Cola, Diet Double Cola	Double-Cola
Dr Pepper, Diet Dr Pepper	Dr Pepper
Dr. Brown's	American Beverage
Dr. Wells	Flavette
EnerGade	Cott
Eton	V & E Kohnstamm
Fanta	Coca-Cola
Flavette	Flavette
Four Percent	Four Percent
Fresca	Coca-Cola
Frostie, Diet Frostie	Frostie
Fruit Beer	Royal Crown
Gatorade	Royal Crown Cola
Ginger Beer	Cock'n Bull; Royal Crown
Golden Girl Cola	Sun-Drop Div. Beverages Intl.
Glow Cola	Bottlers International
Goody	Creme-O-Coco
Grapelte	Flavette
Grapico	Grapico
Hep	Red Rock
Hires Root Beer, Diet Hires Root Beer	Hires, Div. Beverages Intl.
Hi-Spot Lemon Soda	Canada Dry
Hoffman	American Beverage
Ho Ko	Bottlers International
Honey Dew	Quench Co.
Howdy	Seven-Up
Hustle	Dr Pepper
Ironbeer	A.J. Lehman
Jack Frost	Salient Flavoring
Jack Pot	Perfection Co.
Jamaica Cola	Canada Dry
Jovo	Salient Flavoring
Jubilee	Royal Crown
Ju-C-Orange	Ju-C-Orange
Julep	Julep Co.
Jumbo	Double-Cola
Kayo	Dairy House
KC Cola	Royal Crown
Kola Champagne	Canada Dry
Kick	Royal Crown Cola
Kist	Moxie-Monarch-NuGrape
Korker	Virginia Dare
Lemmy	A.J. Lehman
Lemonette	Flavette
Lift	Royal Crown Cola
Little Wonder	American "76" Co.
Lo-Cal	No-Cal
London Dry Flavors	London Dry
Lotta Cola	Lotta Cola
Luau	Royal Crown Cola
Lucky Club Cola	Lucky Club
Ma's Cola	Ma's Old Fashion
Ma's Old Fashion Root Beer, Dietic Ma's Root Beer	Ma's Old Fashion
Mason's Root Beer	Mason & Mason
Mineral Water Table Water	Canada Dry
Mission Beverages	Mission of California
Mo-Choc	Carolina Beverage
Moonade	Carolina Beverage
Monkey	Royal Crown
Moonshine	Bottlers International
Mooo Cho	Mooo Cho
Mountain Dew	Pepsi-Cola
Moxie	Moxie-Monarch-NuGrape
Mr. Energy	Yoo-Hoo
Mr. Cola	Grapette
Mr. Root Beer	Flavette
National	National Fruit Flavor
Nedicks	Yoo-Hoo
Nehi Flavors	Royal Crown Cola
Nesbitt's	Nesbitt
New Yorker Flavors	Grapico
Nifty-Cavalcade	Salient Flavoring
No-Cal	No-Cal
Nu-Grape	Moxie-Monarch-NuGrape
Old Colony	Crush International
Old Red Eye	Flavette
Orange-Crush, Diet Orange Crush	Crush International
Orangette	Flavette
Orangico	Grapico

(continued on page 129)

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BRAND NAMES

(continued from page 128)

Pal Cola	Tru-Ade
Par-T-Pak	Royal Crown
Patio Flavors	Pepsi-Cola
Pennsylvania Dutch Birch Beer	Pennsylvania Dutch Birch Beer
Pepsi-Cola, Diet Pepsi-Cola	Pepsi-Cola
Plymouth Rock Flavors	American "76"
Pommac	Dr Pepper
Pop Kola	Creative Flavors
Purple Passion	Canada Dry
"Q" Tonic	"Que" Tonic
Quench	Quench Co.
Quiky	Mission of California
RC with A Twist of Lemon	Royal Crown
Red	Royal Crown
Red Rock	Red Rock
Richardson Root Beer	Richardson Corp.
Rock & Rye	Royal Crown
Rooti Root Beer	Canada Dry
Royal Crown Cola	Royal Crown Cola
Rummy	Wonder Orange
Salute Flavors	Dr Pepper
Schweppes Tonic	Schweppes
7Up, Diet 7Up	Seven-Up
"76", Low Calorie "76"	American "76"
Simba	Coca-Cola
Ski	Double-Cola
Slender	Virginia Dare
Snow Peak	American Beverage
Southway Flavor Line	Creative Flavors
Spizz	Perfection Co.
Spur Cola	Canada Dry
Sport-Cola	Canada Dry
Sprite	Coca-Cola
Squeeze	National Fruit Flavor
Squirt, Diet Squirt	Squirt
Sunburst Flavors	Flavette
Sun Crest	Moxie-Monarch-NuGrape
Sun Drop	Sun Drop Div., Beverages Intl.
Sunripe	Canada Dry
Sun-Rise	Sun-Rise
Sun-Tang	Perfection Co.
Sun Valley	American "76"
Sweet 'N' Low	Moxie-Monarch-NuGrape
Tab	Coca-Cola
Tahitian Treat	Canada Dry
Tart	"Que" Tonic
Teem	Pepsi-Cola
Tingle	Creative Flavors
Tom Collins Jr.	A.J. Lehman
Trim Beverages	B-1 Beverage
Triple XXX	Triple XXX
Tropic Surf	Pepsi-Cola
Tru-Ade	Tru-Ade
Upper-10	Royal Crown Cola
Uptown	Uptown Eastern Sales
Veep	Coca-Cola
Vernors, Vernors 1-Calorie	Vernors
Vess Draf Style Root Beer	Vess
Vess Billion Bubble	Vess
Virginia Dare	Virginia Dare
Viva	Canada Dry
Whistle Orange	Vess
White Lightnin'	London Dry
White Rock	White Rock
Wink	Canada Dry
Witesoda	"Que" Tonic
Wonder Orange	Wonder Orange
Yoo-Hoo Chocolate Drink	Yoo-Hoo

EXHIBIT No. 1

POUR ON THE PROFITS WITH THE...

ORIGINAL DRAFT ROOT BEER

DAD'S—
regular and diet

A DAD'S franchise is foaming over with opportunities. Promotions come thick and fast. Heavy exposure in national consumer magazines, newspapers, TV and radio. With movie and network TV tie-ins.

Root Beer is moving fast . . .
DAD'S is moving faster!

Get in touch, and find out why DAD'S the *original* Draft Root Beer –is leading the followers.

DAD'S ROOT BEER COMPANY • 2800 N. Pullman Ave • Chicago, Ill 60618 312 [illegible]

EXHIBIT R-b

Some of our competitors would like you to think Frostie is the Avis of the root beer business . . .

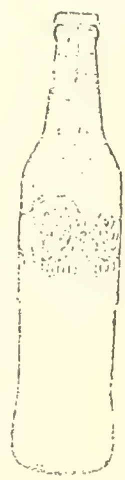
and that Hertz.

FROSTIE has always been a quietly progressive brand. Without making superfluous noise, we've been gaining a larger, and larger share of the root beer market.

In fact, FROSTIE's market share has reached the extent to where we have more bottlers and more distribution in more areas of the Nation than any competitive root beer brand.

We've also made a quiet breakthrough in flavor. A taste that's different than all the other Root Beers!

Perhaps you ought to look into a FROSTIE franchise. Find out why we've grown so strong . . . and keep getting stronger.



A DIFFERENT KIND OF ROOT BEER!

THE FROSTIE COMPANY

Crestmont & Haddon Aves., Camden, New Jersey 08103

Circle no. 54 on Reader Service Card

EXHIBIT N-3

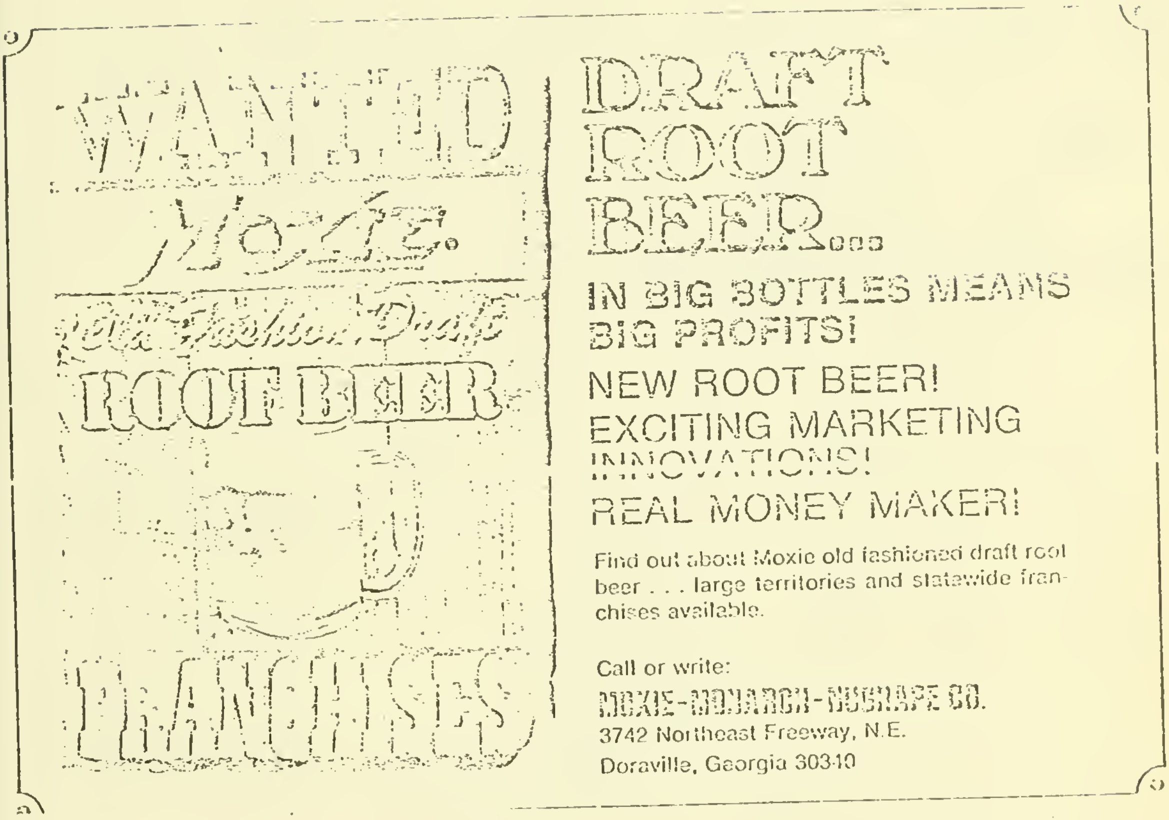
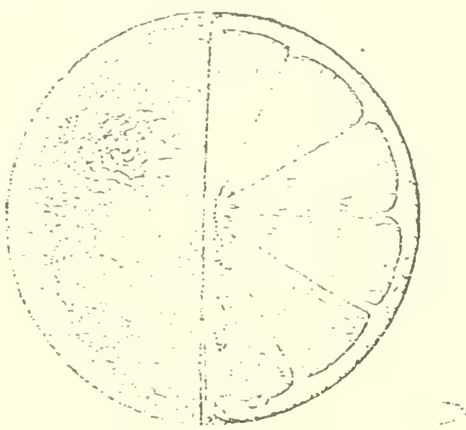

WANTED
Moxie
Old Fashion Draft
ROOT BEER
FRANCHISES
DRAFT
ROOT
BEER...
IN BIG BOTTLES MEANS
BIG PROFITS!
NEW ROOT BEER!
EXCITING MARKETING
INNOVATIONS!
REAL MONEY MAKER!
Find out about Moxie old fashioned draft root beer . . . large territories and statewide franchises available.
Call or write:
MOXIE-MONARCH-NUGRAPE CO.
3742 Northeast Freeway, N.E.
Doraville, Georgia 30340

EXHIBIT N-4

Orange is America's 3rd largest selling soft drink.

Are you getting your slice?



Orange has carved out 10% of the soft drink market. And the dominant orange is Nesbitt's. The one that more families take home. It's your best bet for getting a bigger slice of the action. Orange is the fastest growing segment. And that's even more reason to bottle Nesbitt's. Why?

Because Nesbitt's is the largest and fastest growing orange franchise operation in the nation. Orange is unsqueezed profits. Until you start bottling Nesbitt's. To get your slice of the big orange market, join up with Nesbitt's. The Number One orange soft drink in America.

Nesbitt's

For specifics write FRANCHISING, Nesbitt Food Products, Inc. 2915 East 11th Street, Los Angeles, Calif. 90023. Or call collect (213) 263 3451

Circle no. 112 on Reader Service Card

EXHIBIT N-5

Join the cold rush. Discover Orange CRUSH®

Orange CRUSH®, for over half a century, has been the world's Number One orange soft drink.

The reason is simple. No one has ever been able to match the quality, purity and freshness of Orange CRUSH®.

If you want a franchise that won't compromise with good taste

Join the Cold Rush
Discover Orange CRUSH®.

Do it today—
Write Franchise Director
Crush International inc.
2201 W. Main Street
Evanston, Illinois 60202

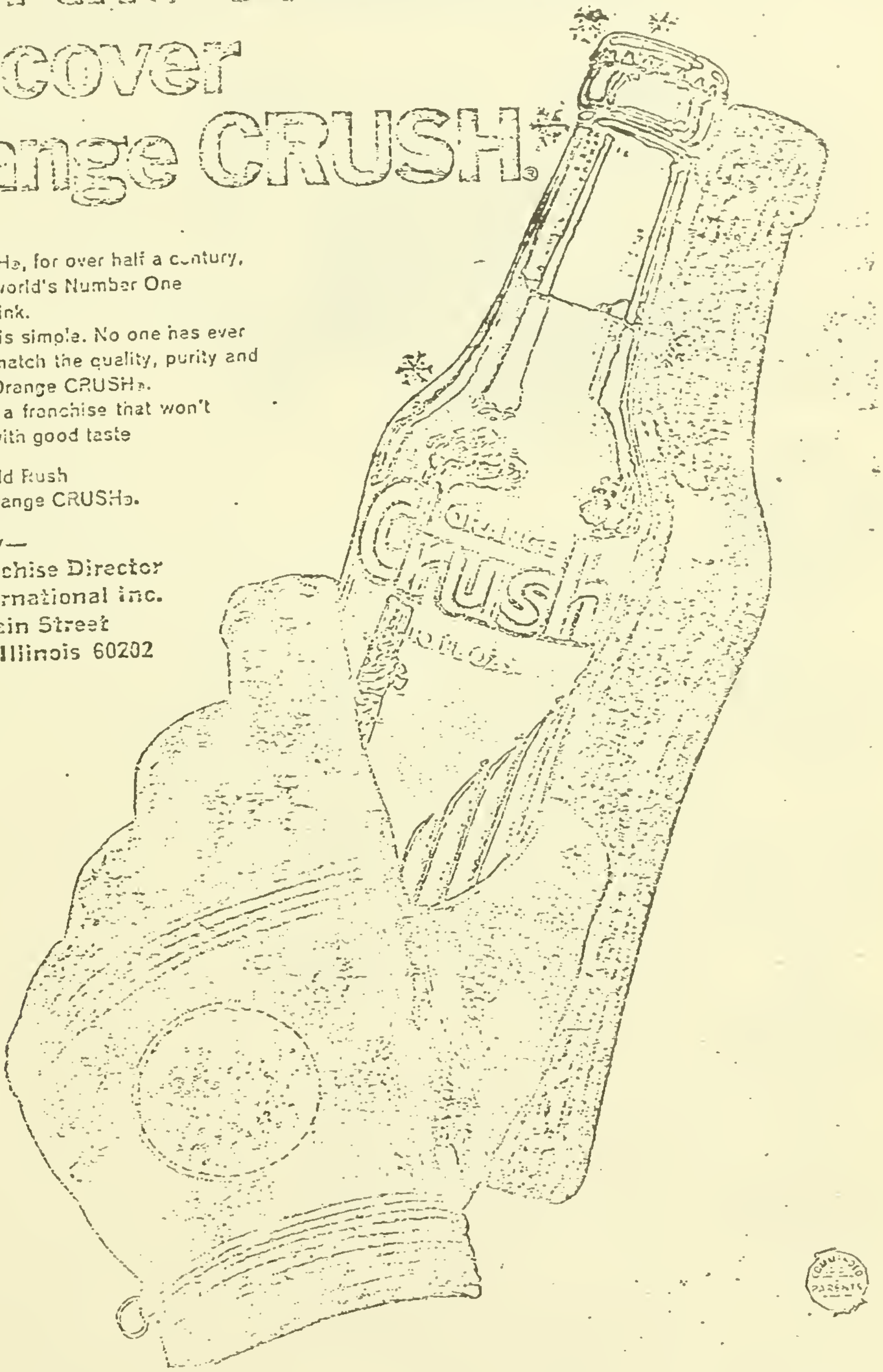


EXHIBIT N-6

BEVERAGE INDUSTRY
4/31/72 p.5

EXHIBIT N-7

WHO NEEDS ANOTHER BEVERAGE LINE?

YOU DO! IF IT'S Yoo-hoo®

because:

YOO-HOO MEANS EXTRA VOLUME. Yoo-Hoo Chocolate and Yoo-Hoo Strawberry provide increased tonnage for your trucks.

YOO-HOO MEANS ADDED PROFITS...without competing with whatever else you're selling.

YOO-HOO IS THE ACKNOWLEDGED LEADER in chocolate soft drinks...both here and abroad...in both technology and popularity.

YOO-HOO PROVIDES UNLIMITED SHELF LIFE. Yoo-Hoo's exclusive sterilization process assures product stability without refrigeration in any climate in the world.

YOO-HOO FLAVOR IS UNIQUE...delicious, unequalled, completely uniform...year-in, year-out...because only Yoo-Hoo maintains complete quality control from raw ingredients through final "in bottle" sterilization.

ONLY YOO-HOO BACKS YOU with a total advertising and promotion program including television commercials, drive-in movie films, radio jingles, newspaper ads, outdoor bulletins and point-of-sale geared to local in-store promotions.

YOO-HOO PROVIDES ANOTHER PLUS...*high nutrition.* It contains the highest quality and content of protein found in any soft drink! Yoo-Hoo is actually good for you. This makes it marketable to the millions who want more than just a thirst-quencher! Good for every age!

WHY NOT MAKE AMERICA'S FIRST CHOICE IN CHOCOLATE DRINKS, YOURS?

NEW DISTRIBUTORSHIPS AND FRANCHISES AVAILABLE NOW!

AMERICA'S No. 1 CHOCOLATE DRINK WORLD'S No. 1 CHOCOLATE DRINK

CLIP AND MAIL!

Yoo-Hoo Chocolate Beverage Corp.,
Franchise Division, 600 Commercial Ave.,
Carlstadt, New Jersey 07072

GENTLEMEN: Please send me details on America's No. 1 Chocolate Drink, and the new profit opportunity it offers me

☐ AS A LICENSEE

☐ AS A DISTRIBUTOR

NAME

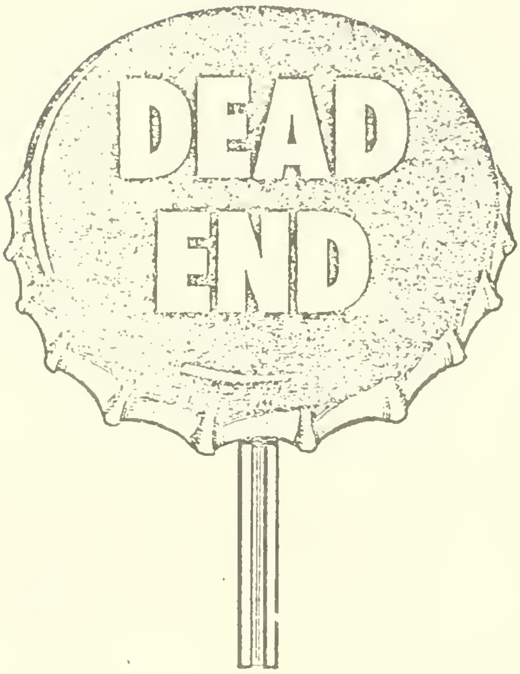
COMPANY TITLE

ADDRESS

CITY STATE ZIP CODE

See you at the NSDA — BOOTH = 1804

EXHIBIT N-8



If you've reached dead-end with your present franchise or bottling operation (particularly Coke, Pepsi, 7-Up or RC) then investigate the new sales and profit potential of a

MA'S OLD FASHION ROOT BEER MASTER FRANCHISE

We offer you:

- A protected multi-state or multi-county territory
- A unique broker-selling program covering supermarkets, chains and leading independent grocers
- Low case costs—high profits
- New volume potential
- A popular seller that will round out your line and help overcome your present saturation problems
- Proved acceptance of a quality product, one the trade regards as the finest root beer on the market
- Promotional and advertising support

Get complete details today about this profitable franchise.

Call or write: ISAAC ROTHSTEIN, Pres.
BILL GELB, Vice Pres.
MA'S OLD FASHION, INC.
172 South Washington Street
Wilkes-Barre, Pa. 18702
Phone: 717-822-3731

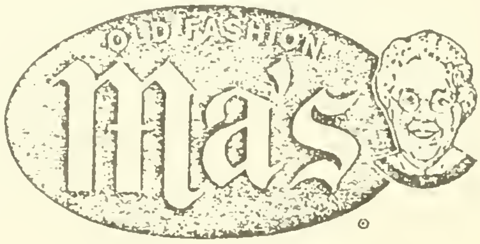


EXHIBIT N-9

DIXI COLA turns on sales

Dixi is a quality cola that makes friends at first taste. It rounds out your line with a drink that gets you into the profitable cola market.

Discover for yourself the Dixi Cola formula for sales success:

• A cola flavor second to none • Proved customer acceptance that means profits • Advertising and promotional assistance • A complete line of heads-up packaging — returnables, no-returns and cans.

If you wish to become a part of this winning team, write or call today.

THE FRANCHISE WITH A FUTURE!

DIXI COLA INC.
6600 Whitestone Rd.
Baltimore, Md. 21207

Phone: (301)
944-9410

BEVERAGE INDUSTRY
5/5/72

EXHIBIT N-10

Welcome to the club. Clicquot Club.

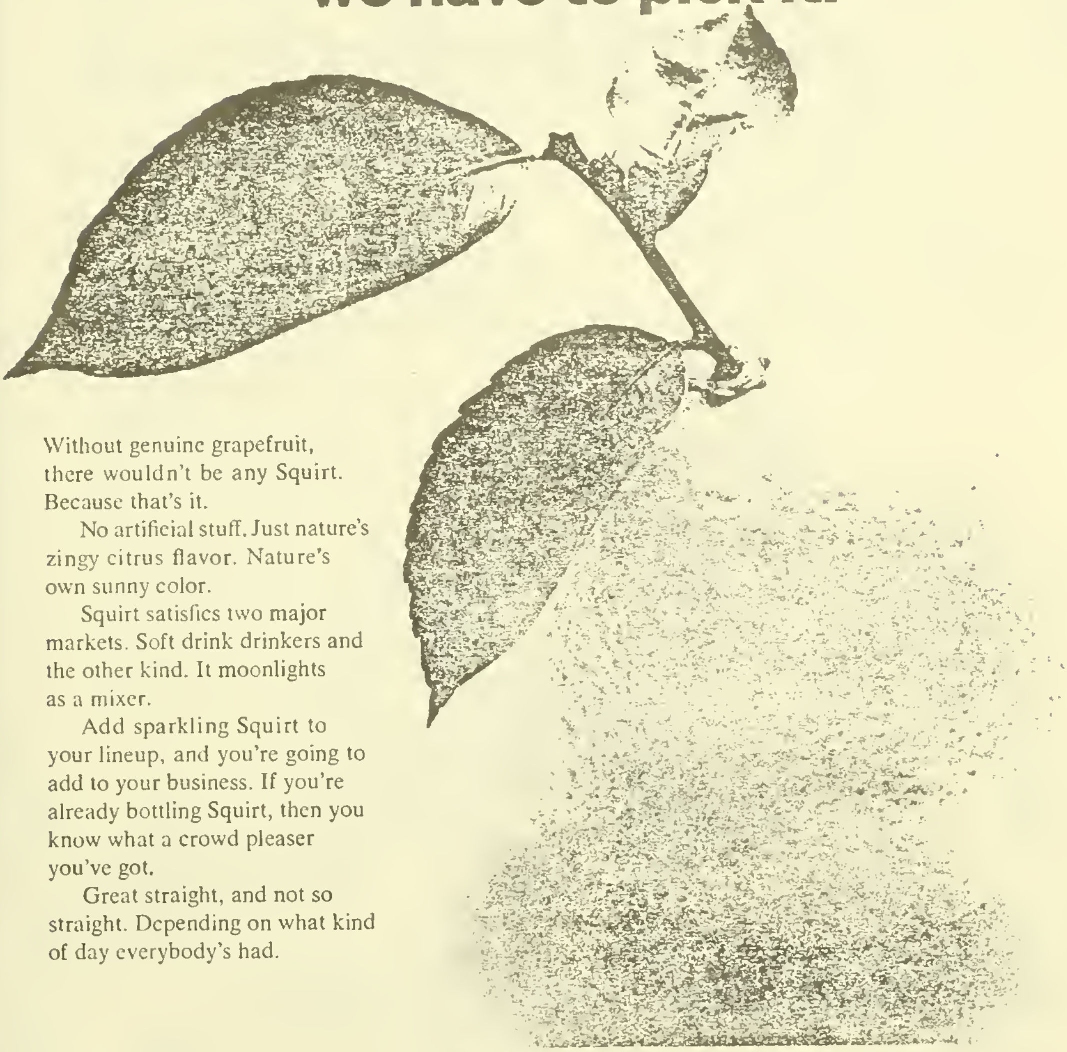
franchwise . . . profitwise you're in good company

You'll love the extra business and profit the full line of regular and diet Clicquot Club mixes and flavors will bring you.

This famous quality line has been a family favorite for nearly a century. Consistent advertising and promotional programs have made Clicquot Club the profit line for bottlers. To get all the information on a Clicquot Club franchise write, George Martin, Franchise Division, 197 Chatham Street, New Haven, Connecticut 06513.

EXHIBIT N-11

Before you can get Squirt, we have to pick it.



Without genuine grapefruit, there wouldn't be any Squirt. Because that's it.

No artificial stuff. Just nature's zingy citrus flavor. Nature's own sunny color.

Squirt satisfies two major markets. Soft drink drinkers and the other kind. It moonlights as a mixer.

Add sparkling Squirt to your lineup, and you're going to add to your business. If you're already bottling Squirt, then you know what a crowd pleaser you've got.

Great straight, and not so straight. Depending on what kind of day everybody's had.

The Squirt Company, 4610 Van Nuys Boulevard, Sherman Oaks, California 91403. Phone: (213) 789-8121. In Canada, contact: Squirt of Canada, 11 Cobourg Street, Stratford, Ontario, Canada. Phone: 271-1550. In Mexico, contact: Refre-Mex., S.A. de C.V., Sinaloa No. 39, 5o. Piso, México 7, D.F.

EXHIBIT N-12

More than ever, there's a natural market for a natural soft drink.

Today, consumers are looking for natural products, so there's an enormous and eager market for an orange soft drink that's made the natural way with natural ingredients.

You can satisfy that market with Tru-Ade—The Orange Soft Drink Made With Oranges—and Not Carbonated.

Tru-Ade contains no synthetic flavorings and it's pasteurized to protect the flavor. (Because it contains real orange juice.)

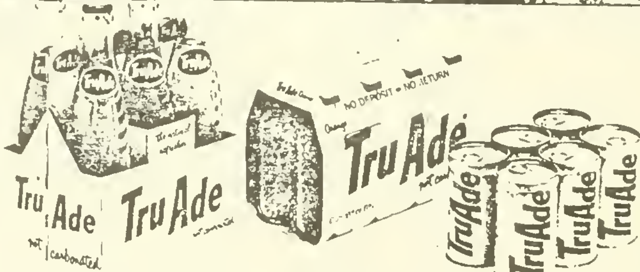
To tell that story, we have developed a fascinating "Back To Nature" TV and radio advertising campaign—that has already proven it sells.

Get your share of the booming natural soft drink market.

For more information about a franchise, phone Tru-Ade, at (212) 832-7205.

Or write: 123 E. 54 St., New York 10022.

Tru Ade®



TRU-ADE ORANGE—MADE WITH ORANGES. NOT CARBONATED.

Circle no. 105 on Reader Service Card

EXHIBIT O

Cola Drinks Available in
Silver Spring, Maryland Area *

1. Coca-Cola
2. Pepsi-Cola
3. Royal Crown Cola
4. Canada Dry Jamaica Cola
5. Shasta Cola
6. Frank's Cola
7. Rock Creek Cola A-Go-Go
8. Blair House Mexi-Cola
9. Giant Cola
10. Cragmont Cola (Safeway)
11. Yukon Club Cola (A&P)
12. Grand Union Cola
13. Penguin Cola (Grand Union)
14. Co-op Cola (Consumer Co-Op)
15. Fyne Taste Cola (Pantry Pride)
16. Frolic Cola (Mimco)
17. People's Cola (People's Drug Stores)
18. Dart Cola (Dart Drug Stores)
19. 7-Eleven Cola
20. Bond Street Cola (A&P)
21. Valu Vend Cola
22. Bala-Club Cola (being redesignated as "Super Saver" Cola", Acme)
23. Glee Cola (Giant)
24. Pantry Pride Cola
25. Dixi Cola
26. Hoffman Cola

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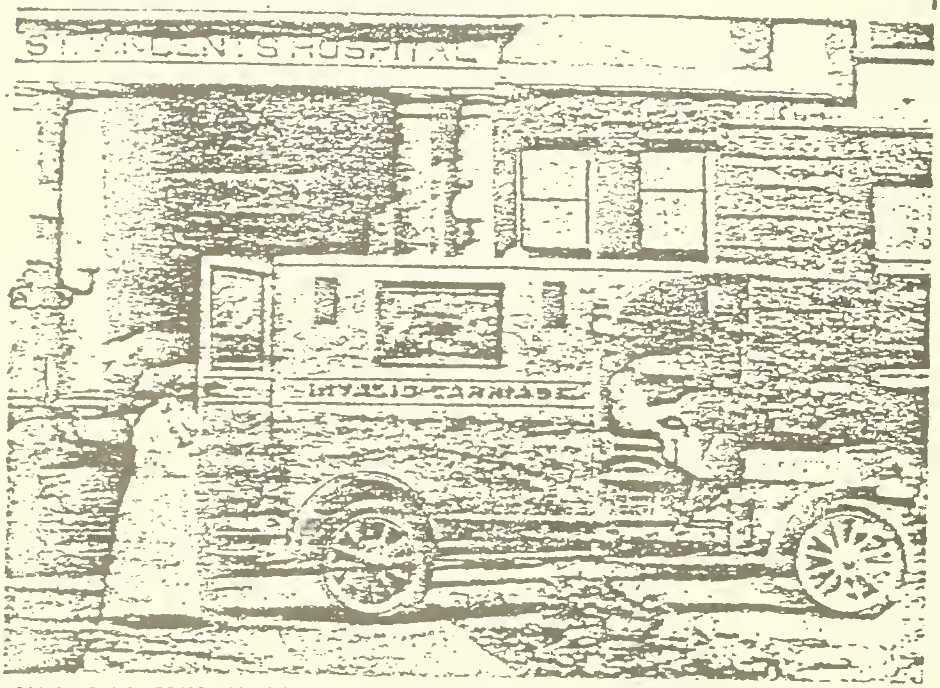
*Does not include diet colas.

EXHIBIT P

A giant step back



WHEN BIRMINGHAM WAS YOUNG
COKE WAS JUST 7/10¢ AN OUNCE.

it still is... 7/10¢

Back in 1902 you paid a nickel for a 6½ ounce bottle of Coke. TODAY, when you buy the handy 8 pack of 16 ounce bottles, FOUR FULL 32 OUNCE QUARTS.... you still pay just 7/10¢ per ounce at most stores. Buy an 8 pack of 16 ounce bottles of Coke... The Real Thing!

Bottled under the authority of the Coca-Cola Company by: The Birmingham Coca-Cola Bottling Co.

It's the real thing.

PER OUNCE WHEN YOU BUY
THE 16 oz. 8-BOTTLE CARTON

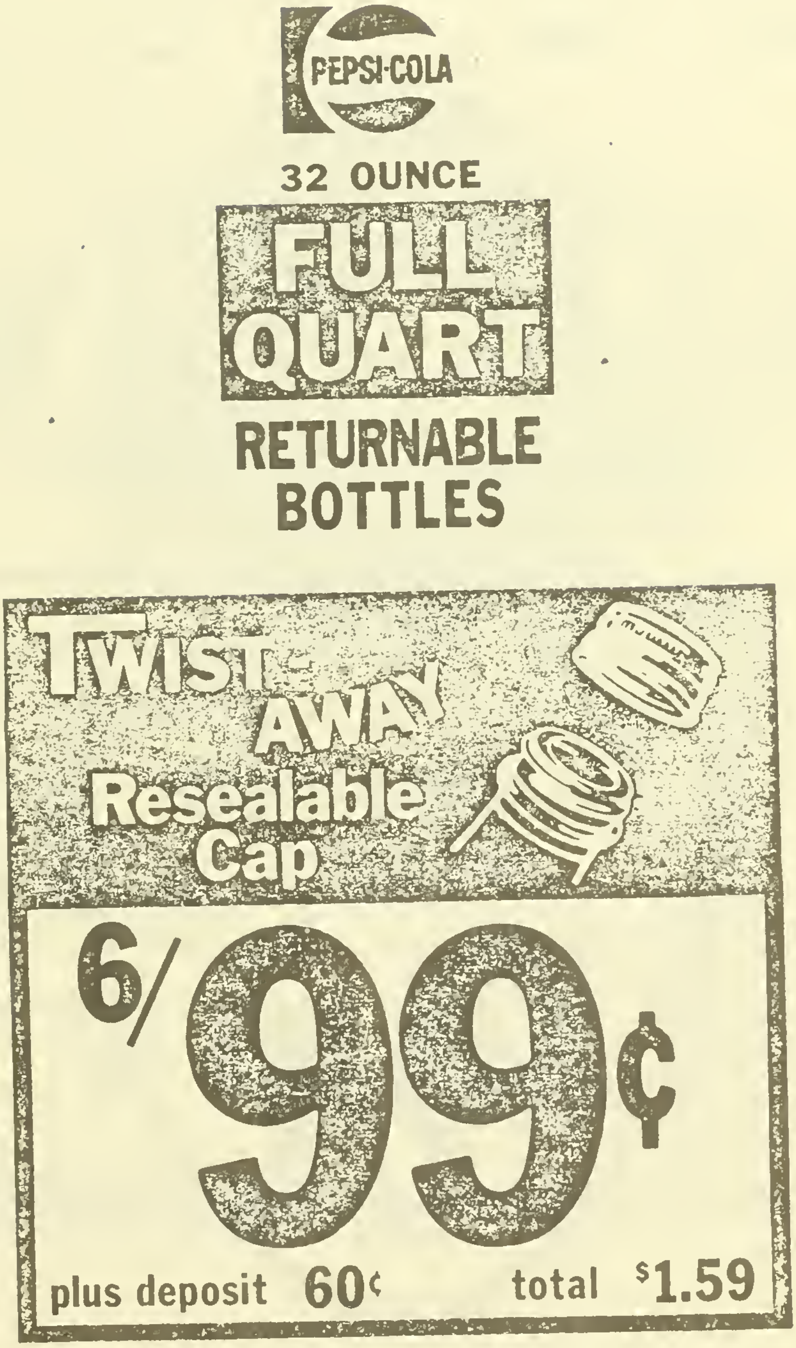
BIRMINGHAM, ALA. — The Coca-Cola Bottling Co. here recently took a giant step back in time with an advertisement it ran in the *Birmingham News.*

To bring home the point that Coke costs the same today when packed in the 16-ounce eight-bottle carrier, as it did in 1902, Coke uses a 70-year-old photograph of "when Birmingham was young."

Coke was 7/10 cents per ounce at that time, the copy reads, and "still is."

Shown above are two attendents closing the loading doors of an "invalid carriage." Behind them is Birmingham's St. Vincent's Hospital.

EXHIBIT Q



88-027 O - 73 - pt. 2 - 7

EXHIBIT R

THE WASHINGTON POST

Thursday, April 27, 1972

(Ad for Peoples Drug Stores)

EXHIBIT R (Cont.)

THE EVENING STAR A-11
Washington, D. C., Thursday, May 25, 1972

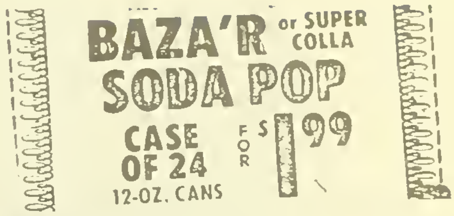
EXHIBIT R (Cont.)

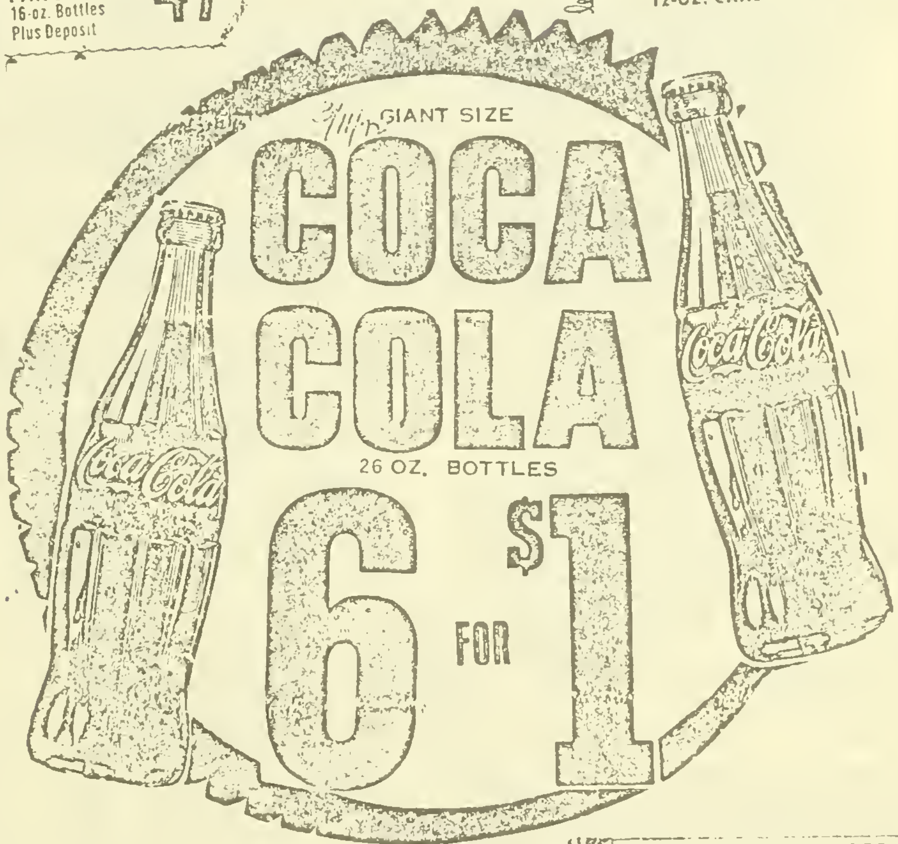
A-8 THE EVENING STAR
Washington, D. C., Thursday, June 29, 1972

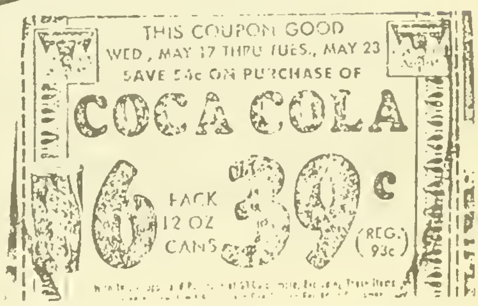
EXHIBIT S

(San Diego, California Market)

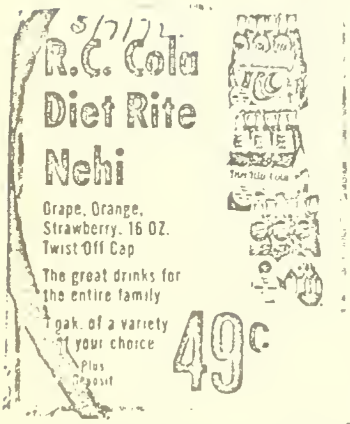
These are all recent ads.







These are all recent ads.



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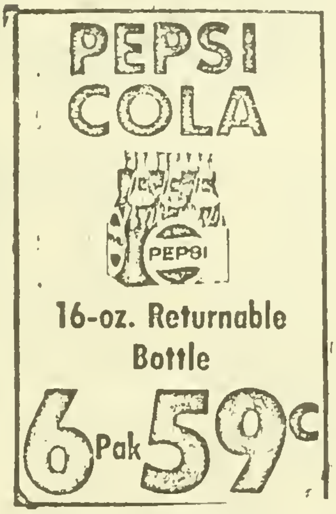

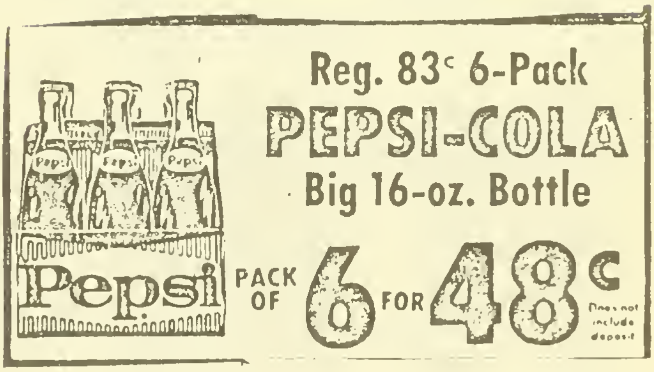

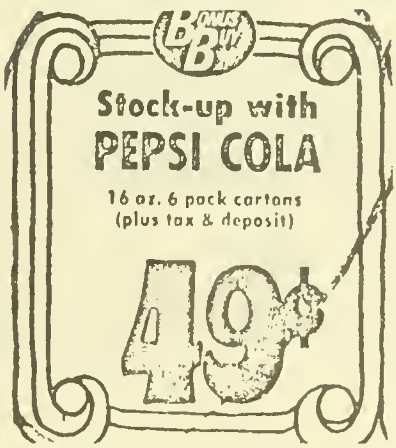

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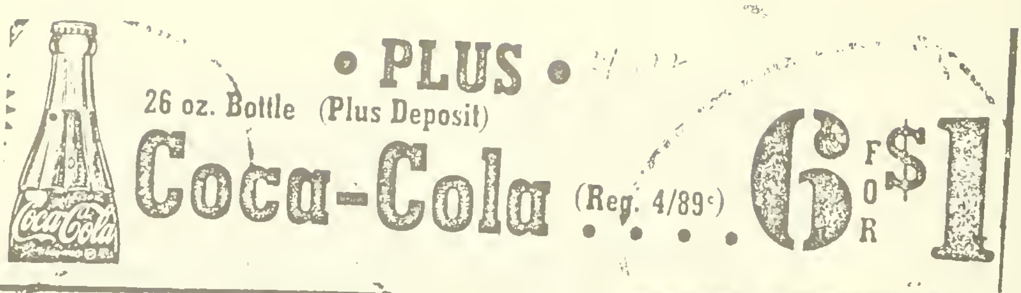

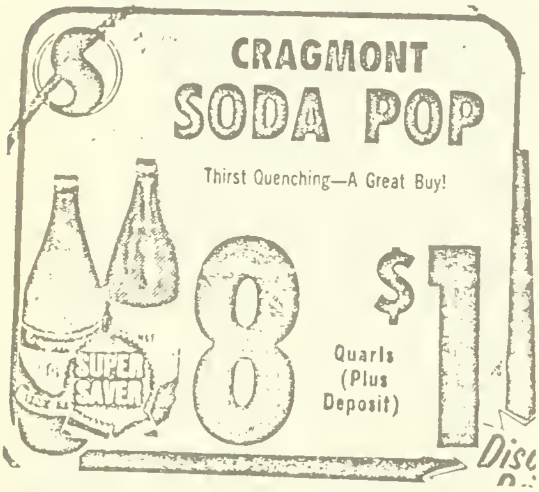

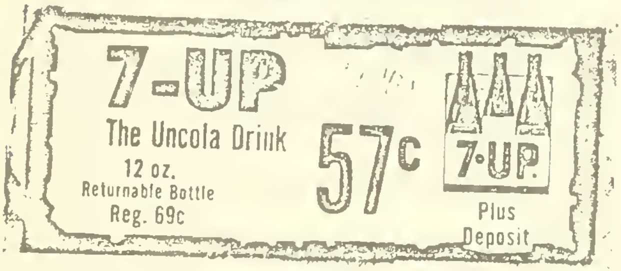

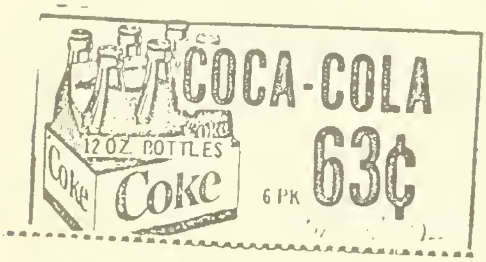

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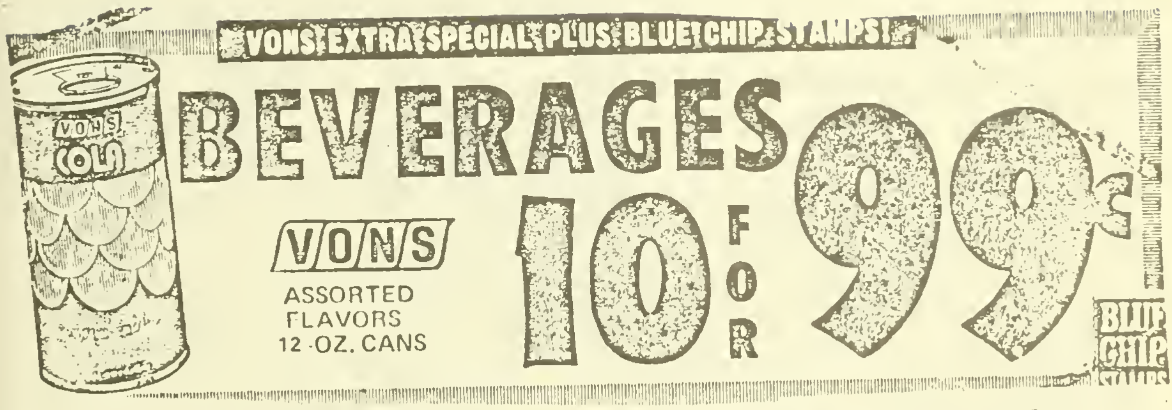
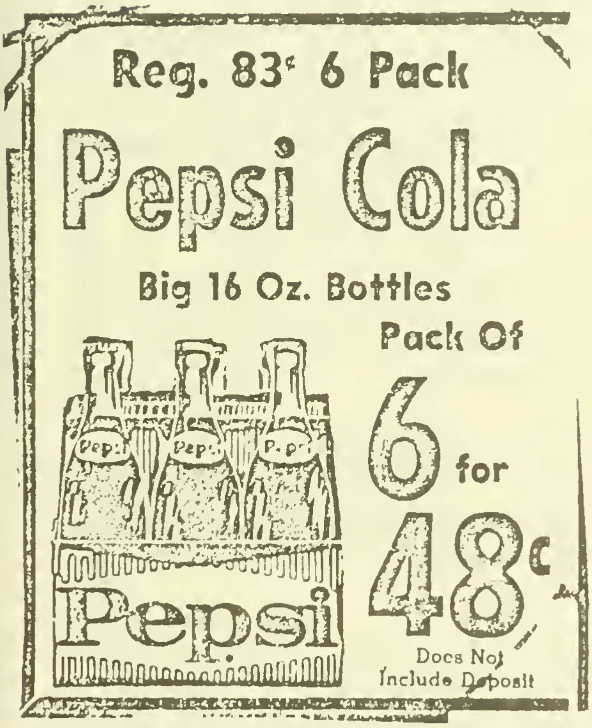
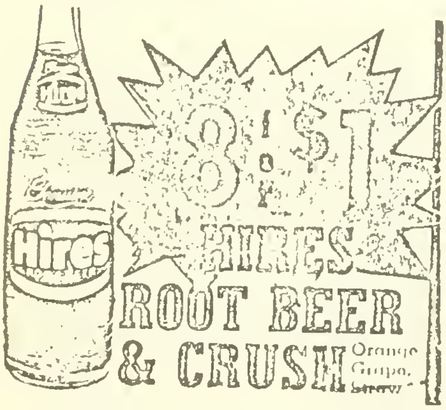




These are all recent ads.



MATERIAL RELATING TO ALLEGATIONS OF INTIMIDATION OF FEDERAL WITNESSES

COCA-COLA BOTTLING CO. OF TAFT ,INC.,
Taft, Calif., August 29, 1972.

Hon. PHILIP A. HART,
United States Senate,
Washington, D.C.

DEAR SENATOR HART: I would like to express my appreciation for the opportunity of appearing before your committee. It reaffirms my faith in the American form of Government and the free enterprise system.

I feel my problem with the Coca-Cola Company is a basic one: Can a small businessman, using his own God-given abilities, go as far as they will take him, or only as far as some big company will let him go? By controlling each bottler's syrup supply, Coca-Cola has a stranglehold on the little man with the potential to better himself.

This was brought home to me again when I returned to Taft after testifying before your committee. The Coca-Cola Company called to tell me that they had gone over their figures and found I had been getting too much syrup, so they were cutting me back to make up for it. In August, I received 1,648 gallons. They have now told me I can have only 1,530 gallons for the entire three months of September, October and November. In my testimony I told you that Coca-Cola had written me a letter showing that my business couldn't survive even if the volume doubled. Now, they are squeezing me down still further.

When I complained to the man who gave me this news, he said "don't blame me, I'm only following orders."

No one realizes better than I do what a powerful organization I am fighting. Considering all the money and influence on their side, the odds sometimes seem overwhelming. Even so, I didn't expect this kind of retaliation for exercising my right to tell Congress what is going on. No wonder I was the only small bottler to speak out against them. If this is an example, I don't see how Congress ever learns the other side of a question.

Now I feel more strongly than ever that the real facts and issues should not be obscured or suppressed by the smoke-screen put up by these powerful men who control the syrup—the life-blood of the soft-drink industry.

Very truly yours,

——— ———.

[From the Washington Post, September 13, 1972]

OPPOSED BILL—COCA-COLA, RC TRIM SUPPLIES OF PROTESTERS

(By Carole Shifrin)

Two soft-drink bottlers who testified last month against legislation the industry is sponsoring faced cutbacks in the supplies, upon which their business relies, it was learned yesterday.

William Pope Foster, a Coca-Cola bottler in Taft, Calif., found his monthly supply of syrup—which he calls the "life-blood" of his business—cut back by two-thirds.

John Alden, bottler of Royal Crown Cola in Denver, Col., found his supply of cans cut by more than half.

Both men had urged Congress not to pass legislation exempting soft-drink bottlers from the antitrust laws so they can maintain exclusive territories the Federal Trade Commission has charged are illegal.

The legislation has been pushed vigorously by the large companies—especially those the FTC charged with illegally restraining trade—who maintain it is needed to protect the small bottlers.

Foster and Alden are two bottlers who came forward to say they didn't want protection—only the chance to compete.

Foster, whose company serves a population of only 20,000, had told the Senate antitrust subcommittee he was driven out of business by the territorial restrictions which hamper his ability to expand and compete for more customers.

Foster returned to California to receive a phone call from the Coca-Cola Co. telling him that "they had gone over the figures and found I had been getting too much syrup, so they were cutting me back to make up for it."

In August, Foster had received 1,648 gallons of syrup. The Coca-Cola official informed him that he could only have 1,530 gallons for the entire three months of September, October and November. Coca-Cola earlier had informed him that his business couldn't survive even if his volume doubled. "Now, they are squeezing me down still further," he wrote Sen. Philip Hart (D-Mich.), chairman of the subcommittee. Foster said the Coca-Cola official who telephoned him said he wasn't to blame; "I'm only following orders."

Foster said he knows that the parent company has a lot of "money and influence" on its side. "No one realizes better than I do what a powerful organization I am fighting," he said. "Even so, I didn't expect this kind of retaliation for exercising my right to tell Congress what is going on."

Whatever the reason—whether his letter to Sen. Hart or his repeated complaints to the company—Foster was informed Friday by Coca-Cola that his supply of syrup would be restored to the old pace.

Jim Evans, on the staff of the bottler operations for Coca-Cola in Atlanta, declined comment yesterday, saying "nobody talks to the press except through our public relations department." Spokesman from that department were not available for comment.

John Alden, a bottler of Royal Crown and other soft drinks, also opposed the legislation at last month's hearings. He told Congress the present restrictions, which prevent bottlers from selling to customers outside a designated territory, "burdens and penalizes" competent and enterprising businessmen while providing "a temporary haven" for those who couldn't exist in a free and competitive marketplace."

That very day, Alden was informed that his company had been placed on quota, limiting the amount of Royal Crown cans he could buy. He was told that the local canner (which is Seven-Up there) was told not to sell him more than a certain amount of Royal Crown cans.

On Sept. 1, the day he found he would be limited to 6,200 cases during the month—about a third of what he had been receiving—Alden filed suit against Royal Crown Cola Co. in U.S. District Court in Denver. His suit alleges that the territorial restrictions and the standard Royal Crown franchise agreement violate the nation's antitrust laws. This is essentially what the FTC is contending.

In contrast to the 6,200 cases Alden was going to get in September, his supplies had averaged 17,000 cases a month for the first seven months of the year, his attorney, Gerald Raskin of the Denver firm of Hindry and Meyer, said yesterday.

COCA-COLA U.S.A.
Atlanta, Ga., September 18, 1972.

Hon. PHILIP A. HART,
Chairman Subcommittee on Antitrust and Monopoly Legislation, Committee on the Judiciary, Washington, D.C.

DEAR MR. CHAIRMAN: On September 13, 1972, the Washington Post carried a news story concerning a letter addressed to you by Mr. William Pope Foster, President of the Coca-Cola Bottling Company of Taft, a bottler controlled by Thrifti-Mart, Inc., a large Los Angeles retail food chain and wholesaler, with 1971 sales of $260 million. Mr. Foster's letter, which we saw for the first time on September 15 when your staff promptly made it available to us, implied that the Coca-Cola Company reduced its syrup sales to the Taft bottler because of his testimony before your Committee on August 15.

The implied charges in that letter are absolutely false. The Coca-Cola Company considers those charges by Thrifti-Mart Taft an outrageous libel and an attempt to divert the attention of your Committee from the main issues before it. The substance of the issues raised by the legislation before your Committee is too serious and complex to have attention diverted by unfounded charges of the kind implied in the Taft letter. For these reasons, we consider it important to set the record straight.

We have in every respect cooperated with your Committee and all other Committees of the Congress which have requested our testimony or assistance in considering problems facing those Committees or legislation before them. This has always been the policy of our Company and it will always be the policy of our Company. In turn, we deeply appreciate the courtesy and fairness with which you are conducting these hearings.

The Thrifti-Mart Taft bottler's quota was not decreased. Indeed, that quota was increased in September, 1972, subsequent to the bottler's testimony before

your Committee and at a time when we had no knowledge whatsoever of the bottler's letter to you.

It is important to set forth the history of our relationship with the Thrifti-Mart Taft bottler.

The contract for Coca-Cola between The Coca-Cola Company and the Taft bottler contains the following provisions:

> Company agrees to furnish Bottler, and only to furnish for the territory herein referred to, sufficient syrup for bottling purposes to meet the requirements of Bottler in the territory herein described.
>
> Bottler agrees . . . not to use trademarks Coca-Cola or Coke nor bottle nor vend said product except in the territory herein referred to.[1]

In January, 1971, the Taft bottler placed an abnormally large order with our canning facility at San Leandro, California. That order alone exceeded the quantity of canned and bottled products sold by this bottler in the previous two and one half years. When asked about this order, the Taft bottler told us that it was supplying a new distributor. This distributor was created for the express purpose of acquiring canned products of The Coca-Cola Company for redistribution and sale outside the Taft territory. This combined activity between the Taft bottler and the newly created distributor constituted a clear violation by the bottler of each of its contracts.

The Federal Trade Commission had already filed its proposed complaint against The Coca-Cola Company contending that the contractual provision breached by the Taft bottler violated the antitrust laws. All of these circumstances placed The Coca-Cola Company in the dilemma of not wanting to cancel the Taft bottler's contract for violation of the very terms being attacked by the FTC; of wanting to fulfill its obligations under the contract to supply that quantity of syrup which the contract called for; but of not wanting to embark on any course of action in direct variance with its contentions to the FTC and its commitment to the Coca-Ccola bottlers throughout the United States to defend and to comply with the terms of the contract.

The Coca-Cola Company attempted to resolve this dilemma by notifying the bottler that it would continue to supply whatever syrup the bottler needed to satisfy the consumer demand in its territory. In an effort to be fair, the Company advised the bottler that the Company would sell in 1971 not only the quantity of syrup shipped in 1970, but that the Company would increase that quantity by 50 per cent. The 50 per cent increase was considered to be more than enough additional syrup to enable the bottler to meet any increased consumer demand within its territory. Thus, the bottler, which had received 8,084 gallons of syrup in 1970, was provided with a quota of 12,126 gallons in 1971. As a matter of fact, through administrative error, the Company actually shipped 14,843 gallons of syrup to the bottler in 1971, some 2,700 gallons in excess of its quota.

On two occasions, before two different federal court judges, the bottler challenged this decision of the Company. Motions for Temporary Restraining Orders and Preliminary Injunctions were made by the Taft bottler seeking to compel the Company to ship Taft unlimited quantities of syrup. In the course of those proceedings all of the foregoing information was made a matter of record. On both occasions the federal court denied the motions made by the Taft bottler.

In December, 1971, a representative of the Company informed Mr. Foster that his quota for 1972 would be the same as his 1971 quota, namely 12,126 gallons. The bottler fully understood this, as evidenced by his conversations with us and his article in the May, 1972 issue of the trade publication *Soft Drinks*.

By the end of July, 1972, the Thrifti-Mart Taft bottler had received almost 1,000 gallons in excess of a reasonable proration of his annual quota. It was this situation, coupled with projected August shipments, that prompted Mr. James Evans of Coca-Cola USA to remind Mr. Foster that his 1972 monthly syrup purchases had been so high that only 2,202 gallons remained in the unfilled quota for the rest of the year. Mr. Evans suggested that he take 1,530 gallons in September, October and November and 672 gallons in December, but told Mr. Foster he could order the 2,202 gallons at any time he wished.

Mr. Evans had made several similar types of calls to Mr. Foster in the course of administering the quota in 1971 and 1972. The August conversation was routine and in no way was intended as a retaliatory measure. During the course of this call Mr. Evans did not make the "I'm only following orders" statement

[1] Similar contract provisions cover other products the Coca-Cola Company sells to Thrifti-Mart Taft such as Tab, Sprite, Fresca and the Fanta line.

attributed to him. In fact, Mr. Evans was routinely attempting to administer the quota, which was his responsibility to handle.

After that conversation between Mr. Evans and Mr. Foster, we learned that the administrative errors in 1971 which inadvertently resulted in Taft being shipped 2,717 gallons more than the originally established quota, had not been taken into account in setting the 1972 quota. We immediately came to the conclusion that it would be unfair for Thrifti-Mart Taft to have to adjust for our error, and therefore directed that a new quota be established. Under that quota, for the year 1972 and in subsequent years, Taft would receive an amount of syrup equal to its actual 1971 purchases, plus a 7 per cent growth factor. We added the 7 per cent annual growth factor—an amount slightly in excess of annual syrup shipment growth in our western area.

We made this decision with the knowledge that Mr. Foster had testified (in the course of a deposition taken in a lawsuit brought by Thrifti-Mart Taft against The Coca-Cola Company) that he was continuing to sell to a food chain that was transporting Coca-Cola outside of the Taft territory for stocking the Thrifti-Mart chain's stores elsewhere.

We are attaching a complete record of the monthly and annual syrup shipments to the Taft bottler from 1970 to date, and a projection of shipments available to the Taft bottler for the remainder of 1972.

We hope that this information will be helpful to you in understanding the facts of this situation. We should appreciate it if you would make this letter a part of the record of your present hearings. If you desire additional information or if you would like me to testify to the facts in this letter. I would be more than willing to do so.

Sincerely,

J. LUCIAN SMITH.

Statistical summary

1970 shipments (gallons)	8, 084
1971 and 1972 quotas (1970+50 percent)	12, 126
1971 actual shipments	14, 843
1972 shipments through September 1, 1972:	
Balance of 1972 quota	9, 989
Remaining September 1, 1972	2, 137
Revised 1972 quota (1971 actual plus 7 percent):	
Balance of revised 1972	15, 882
Quota remaining	5, 893
Increase, 1970–1972	96.5%

NATIONAL SOFT DRINK ASSOCIATION,
Washington, D.C., September 21, 1972.

Sen. PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.

DEAR SENATOR HART: An article by a staff writer for the Washington Post appeared in the September 13, 1972, issue of that paper which implied that two franchise companies in the soft drink industry had restricted the supply of soft drink product or syrup to two bottlers because those bottlers had testified against S. 3133 before your Committee.

While the association did not accept the implications of the article, it felt that the allegations should be resolved as accurate or inaccurate.

The attached correspondence between this office and the franchise companies for the two bottlers concerned demonstrates the inaccuracy of the article as well as the falseness of its implications. If the Washington Post article becomes part of the hearing record, we request that this correspondence also be included in those proceedings.

If there is anything at all you wish further clarified concerning this matter, I hope you will provide us the opportunity to assist your efforts.

Sincerely,

THOMAS F. BAKER,
Executive Vice President.

Attachments.

COCA-COLA U.S.A.,
Atlanta, Ga., September 20, 1972.

THOMAS F. BAKER,
National Soft Drink Association,
Washington, D.C.

DEAR MR. BAKER: The Washington Post carried a news story on September 13 concerning a letter addressed to Senator Phi ip A. Hart (D-Mich.) by Mr. William Pope Foster, President of the Coca-Cola Bottling Company of Taft, California. Mr. Foster's letter implied that The Coca-Cola Company reduced its syrup sales to Coca-Cola Bottling Company of Taft because of Mr. Foster's testimony before the Hart Subcommittee on August 15, 1972.

On September 18, we responded to Mr. Foster's charge by a letter to Senator Hart, a portion of which is quoted as follows:

> On September 13, 1972, the Washington Post carried a news story concerning a letter addressed to you by Mr. William Pope Foster, President of the Coca-Cola Bottling Company of Taft, a bottler controlled by Thrifti-Mart, Inc., a large Los Angeles retail food chain and wholesaler, with 1971 sales of $260 million. Mr. Foster's letter, which we saw for the first time on September 15 when your staff promptly made it available to us, implied that The Coca-Cola Company reduced its syrup sales to the Taft bottler because of his testimony before your Committee on August 15.
>
> The implied charges in that letter are absolutely false. The Coca-Cola Company considers these charges by Thrifti-Mart Taft an outrageous libel and an attempt to divert the attention of your Committee from the main issues before it. The substance of the issues raised by the legislation before your Committee is too serious and complex to have attention diverted by unfounded charges of the kind implied in the Taft letter. For these reasons, we consider it important to set the record straight.
>
> We have in every respect cooperated with your Committee and all other Committees of the Congress which have requested our testimony or assistance in considering problems facing those Committees or legislation before them. This has always been the policy of our Company, and it will always be the policy of our Company. In turn, we deeply appreciate the courtesy and fairness with which you are conducting these hearings.
>
> The Thrifti-Mart Taft bottler's quota was not decreased. Indeed, that quota was increased in September 1972, subsequent to the bottler's testimony before your Committee, and at a time when we had no knowledge whatsoever of the bottler's letter to you.

If there is any additional information you require concerning the Washington Post news item, it will be our pleasure to cooperate with you.

Sincerely,

J. LUCIAN SMITH.

COLUMBUS, GA., *September 14, 1972.*

THOMAS F. BAKER,
Executive Vice President, National Soft Drink Association,
Washington, D.C.:

This is to advise you that Royal Crown Cola Co. categorically denies that limitations placed upon the quantities of Royal Crown canned beverages supplied to Mr. John Alden, our exclusive licensee in the Denver, Colo., area, were the result of retaliatory action because of his testimony before Senator Hart's committee.

At the hearing for a preliminary injunction held in Denver last week on September 8, the chronology of the quantity limitations involved was documented. First, testimony showed that Mr. Alden was advised as early as June of this year that there would be limitations on the quantities of the canned products supplied to him. Second, Royal Crown's contract canner in Denver testified that the limitations were in effect during July and August.

Accordingly, it is obvious that these limitations on canned products had their origin before Mr. Alden testified or, for that matter, before Royal Crown was aware that he would testify.

We should be happy to supply you or anyone else with a copy of the transcript of the September 8 preliminary injunction hearing as soon as it is available.

Please advise us if there is anything else we can do for you in this connection.

R. A. SINCLAIR,
Senior Vice President.

WASHINGTON, D.C., *August 13, 1972.*

REGINALD SINCLAIR, Sr.,
Vice President, Royal Crown Cola Co.,
Columbus, Ga.:

An article in the Washington Post today states that following his testimony against S. 3133, your bottler John Alden faced cutbacks in the supplies upon which his business relies.

Elsewhere in the article states John Alden, on the very day of his testimony, was informed that his company had been placed on quota, limiting the amount of Royal Crown cans he could buy. He was told that the local canner (whch is Seven-Up there) was told not to sell him more than a certain amount of Royal Crown cans.

The article is written to imply that retaliatory action in the form of restricted syrup supplies was taken by the Royal Crown Cola Co. because John Alden testified against S. 3133.

Members of NSDA have in past months worked hard to convey the urgent need for passage of S. 3133 to their representatives in the Congress. Forty-one U.S. Senators and 184 Congressmen endorse this legislation in order to prevent the destruction of the independent, local bottler by the ill-conceived action of a government agency.

Bottlers everywhere are concerned that if the accusation implied in this article is true, it could damage this support.

Please provide me an immediate explanation or denial of this accusation, in categorical terms, that bottlers can forward to their Congressional representatives.

THOMAS F. BAKER.

WASHINGTON, D.C., *August 13, 1972.*

J. LUCIAN SMITH,
President, Coca-Cola U.S.A., Atlanta, Ga.:

An article in the Washington Post today states that following his testimony against S. 3133, your bottler Pope Foster, "returned to California to receive a phone call from the Coca-Cola Co. telling him that they, 'had gone over the figures and found I had been getting too much syrup, so they were cutting me back to make up for it.' "

Elsewhere in the article states Pope Foster, "faced cutbacks in his supply of syrup by two-thirds."

Article further states: "Whatever the reason—whether his letter to Senator Hart or his repeated complaints to the company—Foster was informed Friday by Coca-Cola that his supply of syrup would be restored to the old pace."

The article is written to imply that retaliatory action in the form of restricted syrup supplies was taken by the Coca-Cola Co. because Pope Foster testified against S. 3133.

Members of NSDA have in past months worked hard to convey the urgent need for passage of S. 3133 to their representatives in the Congress. Forty-one U.S. Senators and 184 Congressmen endorse this legislation in order to prevent the destruction of the independent, local bottler by the ill-conceived action of a government agency.

Bottlers everywhere are concerned that if the accusation implied in this article is true, it could damage this support.

Please provide an immediate explanation or denial of this accusation in categorical terms, that bottlers can forward to their Congressional representatives.

THOMAS F. BAKER.

AFFIDAVIT OF WILLIAM POPE FOSTER

William Pope Foster, being duly sworn, deposes and says that:

1. I am over the age of majority and if called as a witness could testify competently to the facts set forth in this Affidavit.

2. I am the President and Chief Executive Officer of the Coca-Cola Bottling Co. of Taft, Inc., which has its place of business at 220 Main Street, Taft, California.

3. On or about June 1, 1950, when the company was controlled by my father Pope Foster, the company entered into a written contract with Pacific Coast

Coca-Cola Bottling Co., a copy of which is attached hereto as Exhibit 1. This contract replaced a similar contract which my father had made with Pacific Coast Coca-Cola Bottling Co. in 1935. The 1950 contract was necessary because my father then wished to incorporate the business he had been conducting as an individual. My father and I have operated continuously since 1935 as bottlers of Coca-Cola in Taft.

4. The Coca-Cola Company has succeeded to the interest of Pacific Coast Coca-Cola Bottling Co. under the 1950 agreement (Exhibit 1).

5. Under the contract (Exhibit 1) The Coca-Cola Company is to supply me with sufficient syrup to meet my needs in the territory within a fifteen mile radius of the center of Taft as it existed in 1935.

6. When The Coca-Cola Company introduced Coca-Cola in cans, many small bottlers, such as my company, were unable to justify the capital investment required to install their own canning facilities. In order that my company might obtain and market Coca-Cola products in cans, the agreement of June 1, 1950, was amended as of June 17, 1960. A copy of the amendment is attached as Exhibit 2.

7. Exhibit 2 permitted my company to acquire canned Coca-Cola products from sources authorized by The Coca-Cola Company, but did not change the territorial restrictions.

8. To provide canning facilities to supply small bottlers with Coca-Cola products in cans, The Coca-Cola Company established, as a subsidiary, Canners for Coca-Cola Bottlers, Inc. This company owns canning facilities and sells canned Coca-Cola products to bottlers who are authorized by The Coca-Cola Company to purchase from it.

9. Canners for Coca-Cola Bottlers, Inc. is the only source from which my company is authorized to obtain Coca-Cola products in cans.

10. In January, 1971, I attempted to place large orders for canned Coca-Cola products with the San Leandro facility of Canners for Coca-Cola Bottlers, Inc. In response to questions from representatives of Coca-Cola, I advised them that my orders were intended to supply customers who wished to buy them from me in Taft. They refused to fill my orders, and informed me that their refusal was based on their belief that my customers would resell the Coca-Cola products for consumption in the territories assigned to other Coca-Cola bottlers.

11. In February, 1971, I filed suit against The Coca-Cola Company and Canners for Coca-Cola Bottlers, Inc. in the United States District Court for the Central District of California, charging that the territorial restrictions imposed by The Coca-Cola Company on its bottlers were in violation of the Antitrust Laws. Responsible officials of The Coca-Cola Company have filed Affidavits in that case stating that The Coca-Cola Company had refused to fill my orders because it was believed that my customers would resell the Coca-Cola products in the territories of other Coca-Cola bottlers.

12. From January through August of 1971, The Coca-Cola Company refused to honor most of my orders for syrup, although they did fill occasional orders, apparently on a random or arbitrary basis.

13. In August, 1971, I was informed by representatives of The Coca-Cola Company that the amount of syrup I could purchase would be determined by three California-based employees of the Company. The designated representatives then told me that I would thereafter be limited each month to 150% of the amount of syrup I had purchased in the corresponding month of 1970.

14. Thereafter, I made a practice of asking The Coca-Cola Company every month how much syrup I could purchase in that month, and then purchasing the full amount allowed by the Company. Because my own records of syrup purchases in 1970 were incomplete, I made no independent calculations of the amount of syrup to be allowed me under the quota imposed by The Coca-Cola Company. Instead, I depended entirely on their determination of what I could have.

15. In the May, 1972, issue of Soft Drink Magazine, I authored an article in which I was critical of the soft drink exclusive territorial assignments. A copy of my article is attached as Exhibit 3.

16. In or about May, 1972, I was advised that I would be invited to testify before the United States Senate Antitrust and Monopoly Subcommittee, regarding S. 3133 and other proposed legislation exempting the soft drink exclusive territories from the antitrust laws. I did in fact testify on August 8, 1972, expressing my opposition to such an examption and to the territorial restrictions imposed by the syrup manufacturers.

17. On or about August 24, 1972, I had a telephone conversation with Mr. Jim Evans at the Atlanta, Georgia offices of The Coca-Cola Company. During that conversation, I asked Mr. Evans how much syrup I could have in September. Mr. Evans then advised me that I had been receiving syrup in excess of my quota, and that I could have 510 gallons of syrup each month for September, October and November, 1972. I complained to Mr. Evans that it seemed he was trying to put me out of business. Mr. Evans disclaimed personal responsibility, and said "Don't blame me. I'm only following orders". He also stated that he did not know who made up the quota or how it was made up. He then suggested that I could take my allotment by ordering one-half a truckload of canned product from San Leandro each month, or a full truckload every other month, ordering the balance in Coca-Cola extract. During our conversation, Mr. Evans stated that the President and Vice-President of The Cola-Cola Company had been embarrassed at the Subcommittee Hearings by many of the questions asked and that the questions asked by the Subcommittee appeared to have been based on confidential information of the Company. I stated that I had not been concerned with the questions asked of Coca-Cola Company representatives as I had enough trouble with the questions asked of me. Mr. Evans said that I had "made quite a sales pitch in Washington and now the Senators didn't know who to believe."

18. On August 29, 1972, I wrote to Senator Philip A. Hart, indicating that I believed the cut-back in my syrup supply by The Coca-Cola Company was in retaliation for my testimony before the Senate Subcommittee on Antitrust and Monopoly. A copy of my letter is attached as Exhibit 4.

19. On or about September 8, 1972, I had another telephone conversation with Mr. Jim Evans. He told me he was afraid they had cut my syrup allowance too far down and that "the powers that be" had decided to change the formula to allow me the amount I had received in 1971 plus an additional 7%.

William Pope Foster.

State of California,
County of Kern, ss:

Subscribed and sworn to before me this 2nd day of October, 1972.
[seal]

Elizabeth W. Mayfield,
Notary Public.

Exhibit 1.—Bottlers Contract, Pacific Coast Coca-Cola Bottling Company

This agreement, made and entered into, on the 1st day of June 1950, by and between Pacific Coast Coca-Co!a Bottling Company, a corporation organized and existing under the laws of the State of California, as party of the first part, and Coca-Cola Bottling Company of Taft, a corporation of the State of California, County of Kern and city of Taft, as party of the second part:

Witnesseth that whereas, party of the first part has received from the Coca-Cola Company certain rights and privileges in regard to the bottling and selling of Coca-Cola in bottles, which is evidenced by its contract with said the Coca-Cola Company; and

Whereas, party of the first part wishes to convey to party of the second part the rights that it has received from the Coca-Cola Company, limited, however, to the following described territory, to-wit: "In the State of California:

"The city of Taft and that territory within a radius of fifteen (15) miles of the center of said city, as the same existed on October 1, 1935, in the County of Kern, excepting that territory which may be within a radius of fifteen (15) miles of the center of the city of Bakersfield, California, as the same existed on October 1, 1935." And whereas, party of the second part is desirous of obtaining the right to bottle Coca-Cola in the territory hereinbefore described.

Now, therefore, for and in consideration of mutual benefits and promises from one to the other, and other valuable consideration, the receipt of which is hereby acknowledged, it is agreed:

First: That party of the first part hereby gives and conveys to party of the second part the right that it received from the Coca-Cola Company, to use the trade-mark name Coca-Cola, and all labe's and designs pertaining thereto, in connection with the product "Coca-Cola" in bottles in the territory hereinbefore described, and party of the first part agrees not to convey, assign or transfer the rights of usage of said name in said territory to any other party whatsoever; and said party of the first part agrees to obtain and furnish to party of the second part, and only to obtain, for the territory herein referred to, sufficient syrup for

bottling purposes to meet the requirements of party of the second part in the territory herein described, provided party of the first part can obtain such syrup from the Coca-Cola Company. Nothing herein, however, shall give party of the second part any interest in the name Coca-Cola, labels, etc., except the same right that party of the first part received from the Coca-Cola Company, nor shall this contract in any way interfere with the use of said name Coca-Cola, labels, etc., in connection with the fountain product of the Coca-Cola Company, it being understood and agreed that the use herewith given shall be confined to the bottled product; the name, labels, etc., in connection with the fountain product having been reserved by the Coca-Cola Company.

Second: Party of the first part does hereby select party of the second part as its sole and exclusive customer and licensee for the purpose of bottling the Bottlers' Syrup, Coca-Cola, in the territory herein described.

Third: Party of the first part does hereby give to party of the second part a license to use the distinctive bottle for Coca-Cola adopted or to be adopted within the territory herein referred to, but said right shall end at such time as this contract is no longer in force or when it shall be terminated by the parties hereto or otherwise, provided, however, all conditions and terms of this contract are fully complied with by party of second part.

Fourth: In consideration of the above conveyance of the rights above described in Paragraphs One, Two and Three and further, in consideration of the consent of the party of the first part to the use of the name Coca-Cola, always in connection with the word "bottling," as a part of the business name of party of the second part, and its further consent to the use by party of the second part of the trade-mark Coca-Cola on the product so sold, party of second part agrees:

(a) Not to manufacture, deal in, sell, offer for sale, use or handle, nor attempt to do so, either directly or indirectly, any product that is a substitute for or an imitation of Coca-Cola, nor any product that can be used unfairly with Coca-Cola.

(b) Not to sell Bottlers' Coca-Cola in syrup form, and not to bottle any Coca-Cola syrup that is made for fountain purposes.

(c) To bottle Coca-Cola in the following manner: To have it thoroughly carbonated, put in bottles, using one ounce of Bottlers' Coca-Cola syrup in a standard bottle for Coca-Cola, using a crown stopper thereon, decorated with the name Coca-Cola in the characteristic script, and to bottle it under such sanitary conditions as shall be in compliance with any and all laws, whether State or National, and as shall conform with conditions necessary in placing on the market a food product.

(d) To buy of or through said first party all Coca-Cola syrup required or used by said second party in the preparation for market of its bottled goods, at the price of one dollar and thirty cents ($1.30) per gallon, delivered at any point in the above mentioned territory where a bottling plant is established by party of the second part, including five cents (5¢) per gallon for advertising matter to be furnished, and an additional six cents (6¢) per gallon for such syrup for every one cent (1¢) increase per pound above seven cents (7¢) in the market price of standard granulated sugar, and on the same basis for any such fractional increase; such increase to be determined quarterly in each year by averaging the market price during the first week in each quarter, January, April, July, and October, as quoted at the refineries by the ten refineries then operating in the United States, having the largest capacity and output. If cash does not accompany the order for said syrup, then party of the first part is to have the right to draw on party of the second part with bill of lading attached for the full purchase price.

(d–1) The said party of the first part has entered into a contract with The Coca-Cola Company, from which it secures said Coca-Cola syrup, by which it pays an agreed price, subject to modification of prices and terms to meet any abnormal or burdensome conditions or occurrence, and to continue during the same, and if they fail to agree on such modification of prices and terms that the same shall be arbitrated, and if a difference arises as to whether such abnormal or burdensome conditions or occurrence exist, then that question is to also be arbitrated; now, therefore, it is hereby expressly agreed by the parties hereto that any increase in price or change in the terms fixed by any such agreement of said parties, or by arbitration, shall automatically increase the price and change the terms during such abnormal or burdensome conditions or occurrence, to the party of the second part herein in the same amount and in the same way as the same may be increased or changed between the said Pacific Coast Coca-Cola Bottling Company and the said The Coca-Cola Company.

(e) To invest in a plant and equipment, and to keep up said plant and equipment in such a condition as will be sufficient to meet satisfactorily the demands

of the business in the territory herein described, and to increase such investment in said business as the demand for Coca-Cola in bottles in said territory may require.

(f) To allow party of first part and The Coca-Cola Company, or either of them, to enter upon and examine the premises, where said Coca-Cola is bottled and prepared for market, and to allow either of them or their agents to make any necessary examination, to see that the provisions of this contract are carried out fully.

(g) Not to use the name Coca-Cola, nor bottle nor vend said product except in the territory herein referred to. This limitation, however, is not to prevent party of the second part from obtaining such rights for other territory from parties authorized to use the name Coca-Cola, and to bottle and vend said product.

(h) To order, for the purpose of bottling Coca-Cola, the distinctive bottle, and none other, adopted or to be adopted by party of the first part; to use said distinctive bottle and none other, in bottling Coca-Cola; and not to use said distinctive bottle for any other purpose than the bottling of Coca-Cola, and not in any territory except as herein referred to. The party of the first part agrees that the privilege of manufacturing this distinctive bottle will be granted to at least three reputable concerns, if a sufficient number of such firms remains in business, in order to secure for party of the second part a reasonable price for such bottles, and a prompt execution of its orders.

(i) Party of the second part hereby agrees to use and purchase such crowns for the bottling of Coca Cola as may be designated and approved by party of the first part. The party of the first part agrees that at least two reputable concerns will be designated to manufacture such crowns, if a sufficient number of such firms remain in business, to secure to party of the second part reasonable prices and prompt service in the execution of its orders, and party of the second part has the right to purchase from any one of the concerns so designated.

Fifth: It is further agreed that so long as said party of the second part shall comply with the terms of this contract, the rights, privileges and immunities hereby granted to said second party shall remain in full force and effect.

Sixth: Failure of party of the second part to properly and vigorously push the sale of Coca-Cola in bottles shall be deemed a violation of this contract, and party of the first part shall have the option to terminate same, by written notice, addressed to the last known place of business of party of the second part.

Seventh: In consideration of the above and foregoing it is agreed by and between the parties hereto, that upon failure of either party to this contract to perform its obligations under this instrument, according to any stipulations or conditions herein, and if said failure shall remain for thirty days after due notice sent by mail to the last named place of business of the party violating the stipulations and conditions of this contract, then the other party shall have the right to terminate this contract after thirty days' written notice, which said notice must be sent by registered mail to the last known place of business of the party so violating this contract.

Eighth: If for any reason, this contract shall be legally terminated by either party, party of the second part shall at once turn over to party of the first part all Coca-Cola syrup which party of the second part may have on hand, and any or all matters and things that may have the trade-mark name Coca-Cola thereon, upon the payment by party of the first part, to party of the second part, of a fair and reasonable market value therefor, and if party of the first part does not desire to purchase the property, matters or things, bearing the trade-mark Coca-Cola, then the party of the second part may dispose of same to any other authorized bottler of Coca-Cola, and if said contract is terminated legally or otherwise, party of the second part agrees that it will not exercise, or attempt to exercise, any rights or privileges hereunder and will forthwith take such action as necessary to eliminate the trade-mark name Coca-Cola from its corporate and/or trade name.

Ninth: It is further agreed that this contract shall not be assigned, transferred or conveyed, in whole or in part, without the written consent of party of the first part and The Coca-Cola Company.

Tenth: If the holder of this license should fail, be by final decree adjudged bankrupt or placed in the hands of a receiver, this contract is automatically terminated, except in the case of proper and lawful proceedings under Chapters X, XI, or XII of the Amendment of 1938 to the Federal Bankruptcy Act or under any provision of any subsequent Amendment to said Act or any other Act of substantially similar nature, termination hereof shall be at the option of Pacific Coast Coca-Cola Bottling Company and/or The Coca-Cola Company.

Eleventh: All prior contracts, licenses and agreements between the parties hereto relating to the above described territory are *ipso facto* cancelled by the execution of this agreement.

In witness whereof, the parties hereto have hereunto set their hands and seals, in triplicate, the day and year first above written.

[SEAL] PACIFIC COAST COCA-COLA BOTTLING COMPANY,
By *H. B. Just, Pres.*
President, Party of First Part.

COCA-COLA BOTTLING COMPANY OF TAFT,
By *Pope Foster, Pres.*
President, Party of Second Part.

Consented to: but pursuant to, and not altering, amending or changing, the contract between The Coca-Cola Company and Pacific Coast Coca-Cola Bottling Company.

THE COCA-COLA COMPANY,
By *Edgar J. Fario,*
Vice President.

EXHIBIT 2.—AMENDMENT TO FIRST-LINE BOTTLER'S CONTRACT (COCA-COLA IN CANS)

This Agreement made as of June 17, 1960, between the Coca-Cola Company, a corporation organized and existing under the laws of the State of Delaware, herein called "Company", as party of the first part, and Coca-Cola Bottling Company of Taft, a corporation organized and existing under the laws of the State of California, and having its principal office in Taft, California, herein called "Bottler", as party of the second part,

Witnesseth: that, whereas, a regular form of Bottler's Contract between company and bottler, dated June 1, 1950, as amended, relating to the bottling and selling of Coca-Cola in bottles in certain territory therein described is in force; and

Whereas, the use in said territory of Coca-Cola in 12 ounce flat top metal cans is also mutually desired, it is agreed:

1. Bottler is hereby authorized to process and sell Coca-Cola in 12 ounce flat top metal cans in said territory. Bottler shall process the product in accordance with instructions and specifications as from time to time furnished by company and shall use only such cans and shipping cases as are approved by company.

2. Notwithstanding the foregoing, so long as, and only so long as economic and other conditions do not justify bottler doing the actual processing, company will permit bottler, for the purpose of supplying the demand for Coca-Cola in cans in said territory, to acquire canned Coca-Cola from such other sources, if any, as may be authorized by company.

3. If bottler processes Coca-Cola in such cans, or if and so long as bottler is authorized by company to acquire such cans from some other approved source, bottler shall supply the demand therefor in said territory.

4. Nothing herein shall be deemed to enlarge upon said Bottler's Contract except as hereinabove specificationally provided nor to limit or to interpret the same, and all provisionsof said contract not in conflict herewith shall also be applicable to the preparation and saleof Coca-Cola in cans, including but not limited to the purchase of syrup, the use of the trade-marks "Coca-Cola" and "Coke" and the right of inspection.

In witness whereof, the Parties hereto have hereunto set their hands and seals, in duplicate, the day and year first above written.

[SEAL] THE COCA-COLA COMPANY,
By *C. W. Hodgson*
Viec President, Party of the First Part.

[SEAL] COCA-COLA BOTTLING COMPANY OF TAFT,
By *Pope Foster, Pres.*
President, Party of the Second Part.

EXHIBIT 3.—WHY I, ONE OF THE COUNTRY'S SMALLEST COKE BOTTLERS, AM SUING THE WORLD'S LARGEST FRANCHISE COMPANY . . .

(By Pope Foster, president and manager, Coca-Cola Bottling Co., Taft, Calif.)

Basically, there are two reasons:

(1) I want to compete for customers in the same manner in which the larger bottlers to the south of me do, and . . . (2) The Coca-Cola Co. is refusing to supply me with sufficient concentrate to serve the customers who want to buy from me.

The Coca-Cola bottler in Los Angeles delivers canned product to warehouses which ship into my territory. The Coca-Cola bottlers in Bakersfield, Bishop, Santa Maria have done the same thing from time to time, although they are much smaller and their syrup supplies have recently been cut, too. I want to be allowed to do what the Los Angeles Coke bottler is still allowed to do . . . and I have the customers here who are ready to accept delivery of thousands of cases of product into their own warehouses as well as for trans-shipment to warehouses in other areas.

Coca-Cola contends that they cannot supply me with the concentrate because they would then be a party to the violation of franchises. At the same time the company supplies concentrate to the larger firms knowing that these bottlers are shipping the product through supermarket warehouses and through the warehouses of the grocery cooperatives in California.

My situation has its roots in the common problems which most of the nation's small bottlers have faced: pressures to meet packaging changes, rising costs of materials, changing marketplaces, out-of-date machinery with insufficient capital and profit potential to finance improvements.

Just to remain in business has been a struggle. Sales for local consumption have dropped as our area's economy changed from oil production to agriculture. We are one of the smallest Coca-Cola plants in the country, as far as I know.

All of our sales—until recently—have been in returnables, 6½ and 12 oz. sizes. Our filler? It's an old Dixie model dating from the 1930's.

Our major outlet is one national chain supermarket. There are three medium size local markets, some mom & pop groceries, plus the liquor stores and some other small outlets. Population of the territory declined as the territory moved from industry to agriculture.

In Taft, you either make it in that chain supermarket or you don't make it at all. Over the years, we have slowly been losing portions of even that business. At any point in time, up to 30 percent of the Coca-Cola products in that supermarket are in packages which we aren't producing or offering.

These are being shipped from the greater Los Angeles area, and yes, I'll admit that the practice started with my permission. Here's what happened:

About ten years ago, we—along with other small bottlers in the southern part of the state—signed an agreement with Los Angeles Coca-Cola and The Coca-Cola Company allowing Los Angeles to ship through warehouses and into our territories. In return, we were told that we would be re-imbursed 10 cents a case, less accounting costs, for the product shipped in.

As time passed, most of the small bottlers in this area were purchased by the larger plants and the adjoining territories were merged.

In 1967, we received another letter from Los Angeles Coca-Cola telling us that they were terminating the agreement to pay the 10 cents per case on the advice of their counsel because of "developments in the Anti-Trust laws". But they didn't stop the shipments.

It wasn't just losing that money which influenced me to sue, however. It was the subsequent harassment and developments which brought about the decision and the determination to proceed.

In mid-1970, I started getting visits from Coca-Cola field personnel and inspectors. I was hold that my plant didn't and couldn't possibly meet current manufacturing and quality control standards. They didn't find anything wrong with my product—although there were occasional variations in mix and fill that resulted from my old equipment.

I was told that I had to make changes and additions to update the plant or else shut down completely.

I told the company I was willing to make the equipment additions and that I wanted their technical assistance. I then received a letter from The Coca-Cola Company advising me that, based on current volume and profitability of the plant, the cost of the new building and equipment they required would literally put me out of business. I was further advised that there was no alternative but to sell the franchise to either the Los Angeles or the Bakersfield Coca-Cola bottler.

Los Angeles was not interested at all and the offer from Bakersfield was unfairly low as far as I was concerned. I felt that an effort was being made to force me out of business by leaving me no choice but to sell cheaply to a single preselected buyer.

In December of 1970, the pressure was so great that a decision had to be made. Just at this time, Tom Heckenkamp and Don MacFarlen contacted me as a possible supplier for their new company, TOMAC, a food distribution firm.

These two men had just formed the business and were looking over the pricing structure of some of the products being sold to the L.A. chain and cooperative warehouses. They decided that soft drinks would be an ideal product for their business. Why did they come to me instead of the larger plants down south? Well, one big reason was price. The chains were paying in the area of $3.00 a case for canned Coke in L.A., and they were looking for a cheaper price.

To make a long story short, TOMAC set up a warehouse in Taft and placed an order with me for delivery of about 50,000 cases a week. I gave them a price below the Los Angeles bottler's price, but one that still made a good profit for me.

I can buy the cans from San Leandro (a parent company-owned canning facility) for $1.96 per case. At my price to TOMAC, I could make money and the product could be delivered in Los Angeles at a price considerably cheaper than what the local producer was charging. The cash flow from the cans would let me finance the new plant so that I could survive and now grow in the business that has been my life.

So, in January of 1971, I placed my first order for 50,000 cases of canned Coke. I phoned the order to San Leandro and then followed it with a confirming letter.

I was told by the young lady who took the order that she would have to check it out, that the order was larger than any I had ever placed and that the company (Atlanta) would have to be contacted.

They were contacted, all right, and it wasn't long before I was told that the order wouldn't be filled!

The reason? Company officials told me that they would not knowingly be a party to the shipment of product across franchise lines and from all indications that was just what I was preparing to do with it.

They were right, of course, that the product was going to be shipped out of my territory, but it was my customer who was doing that. I was only doing what the Los Angeles bottler had been doing for years. I wanted to know why the big boy could do it and why I couldn't. My customers wanted to know why a warehouse in L.A. could buy Coke and ship it, but their warehouse in Taft couldn't do the same thing.

As soon as the lawyers contacted The Coca-Cola Company, I began to receive phone calls and visits from officials of the Coke bottlers association, from other neighboring bottlers and even from a distant cousin I haven't heard from in 25 years, who is a large Coke bottler back in Alabama.

All of them told me basically the same thing: "Don't rock the boat, you're going to ruin it for all of us," or, "What are you doing? You're disgracing the family name." The pressure was intense but I was able to resist. After all, none of them suggested they would help solve my problem—they only wanted to stop me from upsetting their own apple carts.

Meanwhile, I tried to arrange for a contract packer to handle my production while my line was down and my new, modern plant was being built. Coke would only approve production by another Coke bottler. Not surprisingly, those suggested quoted exorbitant prices—so high that there was no way I could use them and continue my business.

Finally, I found a nearby packer with a large, new plant who really wanted the business and quoted realistic prices.

After many delays, Coke decided his plant met all quality control standards, and approved the arrangement. At this point, the Los Angeles bottler threatened to sue the packer, who withdrew because he couldn't afford a costly legal battle.

Along about this time, I started receiving visits from the State Health Department. These inspectors hadn't been to Taft in many years, and maybe it was just a coincidence that they suddenly began making trips to Taft to inspect my plant, then turn around and leave town again.

It seemed that if I didn't go out of business voluntarily, every means possible was going to be used to force me to close down or sell out.

Meanwhile, my attorneys were visiting supermarkets as part of the preparation of my lawsuit, soliciting affidavits from buyers and chain executives.

When they visited Thriftimart, they were taken directly to the president, Robert A. Laverty. He indicated a willingness to assist us in the case.

As a result, he eventually purchased 50 percent of the stock in Taft Coca-Cola Bottling Co. The board of directors stays the same and I'm still president and general manager.

With Laverty's capital, I was then in a position to make the plant improvements the company was demanding and to defeat the pressure to sell or fold up completely.

Now, Coca-Cola Company has rationed my syrup supply. I'm allowed 150% of what I used in 1970, on a month-by-month basis. Because of my small size, the 50% increase over 1970 doesn't allow me to expand my business enough to serve warehouses or other large quantity customers in my territory. I have been told that the other Coke bottlers are on a similar ration, but the impact is only felt by the little fellows like myself. A 50% increase means nothing to me because my volume in 1970 was so small, but a 50% increase for the Los Angeles bottler is so large that, practically, there is no limit on him at all.

Representatives of Coca-Cola tell me they can't stop Los Angeles or anyone else from selling to warehouses who ship into my territory. Well, they have stopped me from doing the same thing. Their actions hold me and other small bottlers back, but they allow the giants to ignore the franchise lines. They don't let me sell to warehouses but they do nothing to stop the big bottlers.

This is nothing more than telling me what customers I can and cannot serve even in my own territory. And it is also telling the customers who they must buy Coke from.

My franchise is the same as the big bottlers' franchise. All I want is the same treatment from The Coca-Cola Company and the Bottler's Association that the big bottlers get.

You know, when I talk to other small bottlers around the country about what's happening here, they just won't believe me.

But I can look around right in their territories and see trouble coming just like it happened here. But still they refuse to believe that it could happen to them.

. . . they're too trusting. Too much like sheep . . . too much like I used to be.

Until I was backed to the wall just once too often, I was willing to believe that there was someone in Atlanta looking out for me and small plants just like mine.

Just about every small town in the country has at least one chain supermarket. That supermarket gets regular deliveries from a warehouse and the truck usually goes back to the warehouse empty, or with a load of empty crates or cardboard salvage.

It seems to me that the bottler in that small town should be allowed to sell his product to that chain if the chain wants to ship it back to the warehouse on that empty truck. And he ought to be allowed to sell to anyone else who wants to buy in his territory.

. . . they say the franchise protects the little man, but from where I sit, it looks like it protects the large bottler more. He sells to my customers, but I'm not allowed to sell to his. The road across the franchise boundary seems to run one way only. Many of my expenses are less than the large bottlers around here. I can sell the products at a lower price. Why shouldn't I be allowed to?

The point I'm making is that the small bottler can compete—I know I could . . . at least for high volume customers. Right now I can't even compete for the chain store business in my town, because it is supplied from a warehouse I'm not able to serve. Others are being allowed to compete with me, but I can't fight back. It looks to me like the right to ship across boundaries would preserve more small bottlers—if they could just see it.

. . . but they are listening to the parent company and the large bottlers who run the Bottlers Association and are afraid that if they lose the "protection" of a franchise, some large bottler up the road will start shipping product into their territories. They ought to know that there really is no protection and that when that times comes, no one will stop the big bottler, but someone will try to stop the little ones from competing equally. The franchisors have no intention of saving the little bottler.

Coca-Cola's president told me of the company's plan to consolidate bottlers into 78 production centers, and I know my plant isn't one of the 78. The one sided enforcement of the franchise territories is helping the consolidation—by forcing the small bottlers to join the big ones. In other words, the franchise system isn't protecting the little man. It's being used to keep him out of the big bottlers' territories.

Well, I'm one of the smallest Coca-Cola bottlers there is and if I can compete in an open market, it looks to me like others could do it too. All of us may not make it, but some will have a fantastic opportunity to build their small companies to a much larger size at the expense of the big bottlers who now have things their own way.

All I ask is the chance to succeed or fail on my own, in a free and equal competition with other Coca-Cola bottlers.

Exhibit 4

Coca-Cola Bottling Co. of Taft, Inc.,
Taft, Calif., August 29, 1972.

Hon. Philip A. Hart,
U.S. Senate,
Washington, D.C.

Dear Senator Hart: I would like to express my appreciation for the opportunity of appearing before your committee. It reaffirms my faith in the American form of government and the free enterprise system.

I feel my problem with the Coca-Cola Company is a basic one: Can a small businessman, using his own God-given abilities, go as far as they will take him, or only as far as some big company will let him go? By controlling each bottler's syrup supply, Coca-Cola has a stranglehold on the little man with the potential to better himself.

This was brought home to me again when I returned to Taft after testifying before your committee. The Coca-Cola Company called to tell me that they had gone over their figures and found I had been getting too much syrup, so they were cutting me back to make up for it. In August, I received 1,648 gallons. They have now told me I can have only 1,530 gallons for the entire three months of September, October and November. In my testimony I told you that Coca-Cola had written me a letter showing that my business couldn't survive even if the volume doubled. Now, they are squeezing me down still further.

When I complained to the man who gave me this news, he said "don't blame me, I'm only following orders."

No one realizes better than I do what a powerful organization I am fighting. Considering all the money and influence on their side, the odds sometimes seem overwhelming. Even so, I didn't expect this kind of retaliation for exercising my right to tell Congress what is going on. No wonder I was the only small bottler to speak out against them. If this is an example, I don't see how Congress ever learns the other side of a question.

Now I feel more strongly than ever that the real facts and issues should not be obscured or suppressed by the smokescreen put up by these powerful men who control the syrup—the lifeblood of the soft-drink industry.

Very truly yours,

William P. Foster.

Royal Crown Bottling Co.,
Denver, Colo., October 5, 1972.

Senator Philip A. Hart,
Chairman, Subcommittee on Antitrust and Monopoly,
U.S. Senate, Washington, D.C.

Dear Senator Hart: It was considerate of you to call our attention to the Strachan letter, in the matter of currently proposed Senate bills, to effect "special interest" amendment to existing antitrust laws; to nullify the efforts of the F.T.C. to enforce the present antitrust laws, prohibiting territorial restrictions in the soft-drink industry.

In reviewing the letter, it appears to be a rehash of the statements already on the hearing records rather than fresh and certain points of specific valid fact. His "Orwellian" overture has the radiant realism of a "soap opera" radio script.

Since my testimony was presented before your committee, our company has initiated an antitrust legal action against one of our concentrate suppliers. Under the circumstances, we are reluctant to become involved with rebuttal to a controversial letter.

Other than real injury to Taft Coca-Cola and Denver Royal Crown, there is no clear proof of sufferings by any bottlers because of "The pendancy of the F.T.C. action"; certainly not deteriorated resale values of franchises and significant reduction of capital investments by bottlers.

"The tendency of small bottlers to get out of business." is a trend that was established several decades before the current F.T.C. development, and will continue at the present rate of mortality, or faster . . . with or without "special interest" legislation.

At that time when the marketplace convincingly confirms the fact that F.T.C. enforcement of "no territorial restrictions" is not of benefit to public interest, a course of legislative action might be indicated. But preventive medicine with unknowing prognosis is dangerous to any patient.

It is the mandate of the Congress for the F.T.C. to enforce the antitrust laws. The F.T.C. is not seeking to restructure the soft drink industry. Actual restructuring of the soft drink industry, by major companies within the industry, has been going on for some time and will continue. The laws of the land and the enforcement agencies should provide the guidelines that shape the structural stance.

In the free and fiercely competitive marketplace, the consumer, with the freedom of choice, will benefit, no matter what, the future industry posture may be.

The heart of the matter is, that the soft drink industry has perpetuated mythology in lieu of methodology. E.g. the myth of the parent company . . . a trade-mark licensing concentrate house with franchised bottlers who more often are puppets in performance. The myth of the returnable bottle as the future of the soft drink business. Truly, preachment of contain soft drink sales to route trucks with costly and out-dated in-store delivery. In today's affluent society, burdened with environmental problems and ecoolgical ecstacies, it has become difficult to determine when a returnable bottle is non-returnable and a non-returnable bottle is returnable. Recent industry press stories confirm that. And the fact that today, more soft drinks are consumed than any other beverage, in spite of the so-called "returnable bottle". The growth of convenience packaging . . . so-called "non-returnable" bottles and cans has overcome the limitations of the "returnable bottle" during the past decade. The present convenience packaging of soft drinks provides greater marketing flexibility, in handling, shipping, warehousing and merchandising.

The continuing growth of the soft drink industry, spear-headed by convenience packaging, has created the current confrontation on the twin issued of territorial restrictions and dominion of product, with the urgent need for the F.T.C. to prevail in the enforcement of the antitrust laws on no territorial restrictions.

The great growth of the soft drink industry has been achieved because of the industry's ability to adjust to the changing social conditions, primarily in following marketing and packaging needs of the retailer and the wants of the consumer. That is why warehouse distribution is so basic. Because of the importance of warehouse distribution in the marketing of soft drinks, products are crossing franchise boundaries, in every marketing area of the country. In most cases, the continuing cross-boundary traffic is initiated by the large, multi-plant bottlers and even concentrate company owned and operated plants, unimpeded. But let a small bottler trespass . . . sanctions against him are promptly effected. One of the most realistic statements made at your hearings, was by the bottler from Taft: "The road runs only one way . . . against the small bottler."

Glass Containers Manufacturers Institute states that returnable bottles shipped in 1971 to the beverage industry maintained a substantial rate of decline. The major can producers confirm a continuous annual increase in the sales of soft drinks in cans. Industry statisticians concur that soft drinks sales in convenience packaging nearly equal sales in "returnable glass." Projections by authoritative sources chart a major portion of total packaged soft drinks consumed, will be poured from convenience packaging, in the years ahead.

There are more than "two disaffected" bottlers in the country. There are dozens of large and small bottlers, possibly hundreds, who have not been brain-washed by industry propaganda. They are yet to be heard from in testimony. Their complaints until recently voiced quietly, are now being heard overtly by the concentrate houses, by the trade, by the trade press.

And the most strident complaint in ever increasing howls involves the matter of "territorial restrictions." The need is now for the F.T.C. to eliminate the illegal territory restrictions, and to enforce the right of the bottler or any purchaser to maintain dominion of the licensed trademark products.

The mystique of the "bottle deposit" should be clearly positioned. Convenience packaging soft drinks cost *less* than returnable bottle packages. In our affluent society, the "bottle deposit" is now a legend. It's truly a "bottle charge." If the bottle doesn't come back, the bottle charge laminated to the retail price is higher than the cost for the same soft drink in a comparable size non-returnable bottle or can. "Bottle trips" in the olden days, were calculated at 40, today about 4 . . . and oftimes only one-way, *one time*!

Congress should protect the consumer's freedom of choice and the consumer's interest. Legislation to protect the soft drink industry from the antitrust laws serves no consumer interest nor benefit. Enforcement of existing antitrust laws by F.T.C., elimination of territorial restrictions on independent bottlers, would not destroy the trade-mark licensing structure of the soft drink industry and the franchise system . . . it would realistically accommodate the industry to the present day business environment.

Any legislation to maintain territorial restrictions, will benefit solely the major bottlers in the heartland of populated trading areas and warehouse buying headquarters. So long as territorial restrictions exist, the little bottlers in the secondary and tertiary marketing areas can only sit . . . sell short . . . drop dead.

If the concentrate houses cited by the F.T.C. need relief, rather than the small bottlers, legislation to exempt the soft drink industry is not the answer. If the major concentrate houses cited are convinced they must save the small bottlers with territory restrictions . . . embarked as these concentrate houses already are on a restructuring program, by blue-printing a minimal group of Production Centers and Distributions Centers . . . which is primarily a warehouse selling posture . . . why don't they buy out the small bottler franchises, negotiated at a fair price? If not with cash, with corporate stock. Or would it be more economical to seek to maintain territorial restrictions and recoup the franchise for free . . . as the small bottler goes down the drain?

In closing and for the records, we welcome the enforcement by F.T.C. of anti-trust violations in eliminating illegal territoral restrictions, as in the best public interest and in the interest of independent businessmen. We do not consider new legislation is needed to protect the consumer of soft drinks, nor the competent large or small producer of soft drinks.

Please excuse the rambling length and repetitive content of the response. We did not have the benefit of any trade association or lobbyist to help us prepare this writing, to give it better direction, muscle or brevity.

Thank you for your kind invitation to testify at your August hearings and this opportunity to respond.

With good wishes.

Cordially,

JOHN M. ALDEN, *President.*

ROYAL CROWN BOTTLING CO.,
Denver, Colo., October 17, 1972.

Mr. CHARLES BANGERT,
% The Office of Senator Hart,
Senate Building, Washington, D.C.

DEAR MR. BANGERT: Further, on the matter of the "curiously co-incidental timing" on shutting off the can supply to our company by Royal Crown Cola Company * * * while I was in Washington on August 9/10, for the bottler bill hearings * * *.

Last week, a general mailing to all Royal Crown Bottlers, was released in Columbus, Georgia by R. A. Sinclair. In addition to his letter (copy enclosed) the mailing included (1) Senator Hart's letter of September 27, to Durkee (2) Durkee's letter of response to Senator Hart dated October 4, enclosing a copy of Judge Finesilver's opinion.

These writings present a well-orchestrated group of self-serving statements that tend to dispel any aura of retaliatory actions. However, several of these statements are distortion of true fact and/or false.

On the visit by two Royal Crown Cola Co. representatives on June 28, a quota was not put into effect. They said they were going to so do. No effective date, no specific quantity was established. The copy of the impaired tape sent to Senator Hart was made *with the full knowledge of the Royal Crown Cola Co. representatives* present.

Our contention of "retaliatory/disciplinary action" is based on the fact that shut-off of can supplies was effected immediately in the August 9/10 period. It was not until September 1 that we finally could determine what the quota figure was for August. That figure was less than the formula proposed on June 28.

But to the point * * * herein is a copy of letter discovered in files at R.C.C.C. by my attornies on their recent trip to Columbus for "discovery".

The enclosed letter poignantly points up * * * not a co-incidental "quota" activity but rather a retaliatory cut-off of can supplies.

Sincerely,

JOHN M. ALDEN, *President.*

AUGUST 10, 1972.

Mr. M. G. WOLFE.
R. W. SUMMERLIN.
Can Shipments—Denver, Colorado.

In relation to my telephone call to you in Chicago on Wednesday, August 9, this is to confirm to you that I have delayed shipments of cans to Royal Crown

Bottling Company of Denver. Through August 11, Denver has purchased 7,560 cases of cans and placed orders for an additional 8,736 cases with delivery requested this week.

In accordance with your instructions of August 10 by telephone, I have stopped any future shipments of cans to the Denver bottler without your authorization. These instructions are also with the approval of Mr. Nolan Murrah as Mr. Thornton was not available.

I hope the above action meets with your approval; however, if there has been any misunderstanding, please let me know right away.

R. W. SUMMERLIN.

ROYAL CROWN COLA CO.,
Columbus, Ga., October 5, 1972.

TO ROYAL CROWN COLA CO. BOTTLERS: We have enclosed for your information a copy of a letter received by Mr. Durkee on October 2, 1972, from Senator Philip A. Hart, Chairman of the Senate Subcommittee on Antirust and Monopoly and Mr. Durkee's reply of October 4, 1972, with respect to allegations that our company had taken retaliatory action against Royal Crown Bottling Company, Denver, Colorado, because of the testimony of its President, Mr. John M. Alden, before the Senate Subcommittee.

As documented in Mr. Durkee's reply to Senator Hart, these allegations which were contained in an item in the September 13, 1972 *Washington Post* are absolutely false and without any foundation in fact whatsoever.

Mr. Alden was notified on June 28, 1972, and not on the day of his testimony before the Senate Subcommittee (August 10, 1972), that the supply of canned beverages available from our company had been limited to a quantity sufficient to service his company's Denver marketing area. This action was taken after it was ascertained that Mr. Alden was seeking to require our company to supply him with quantities of canned beverages greatly in excess of the volume being distributed in the Denver area so as to enable him to distribute in the exclusive licensed areas of other Royal Crown bottlers.

On September 1, 1972, Mr. Alden's company filed suit against Royal Crown Cola Co. in the United States District Court for the District of Colorado challenging the legality of our action and seeking a preliminary injunction requiring us to supply his company with all of our trademarked canned beverages it desired irrespective of the area of distribution.

A hearing was held on this motion for injunction on September 8, 1972, and on September 22, 1972, the Court entered its opinion and order denying the motion for preliminary injunction.

In denying the motion, the Court found as a matter of fact that "To grant relief requested by plaintiff, would (a) enable plaintiff to operate in territories properly licensed to other licensees of defendant without restrictions; (b) plaintiff would at this juncture of the case potentially impair the organization of defendant's entire licensing system; (c) the order would potentially cause a ripple effect extending beyond plaintiff's ten county restricted area and beyond Colorado's borders into other areas thus affecting license privileges of other licensees in their contractual relationships with defendant," and concluded as a matter of law that "The licensing of all defendant's 300 licensees would be substantially affected by a preliminary injunction herein and said licensees who have expended funds to develop their local or regional trade would be adversely affected by this order."

A copy of the full text of the Court's opinion and order is attached for your information. We will keep you informed of further developments in this case.

R. A. SINCLAIR, *Senior Vice President.*

AFFIDAVIT

STATE OF COLORADO,
City and County of Denver, ss:

I, James E. Hunt, being first duly sworn, on oath depose and say that:

1. I have been the Sales Manager of Royal Crown Bottling Company, 4300 Jason Street, Denver, Colorado ("Bottling") for approximately three years and eight months.

2. In addition to being Sales Manager, my duties are to assist in production and plant management. This entails buying finished Royal Crown canned products from outside sources.

3. Bottling has in the normal course of business purchased their finished canned Royal Crown products from Seven-Up Bottling Co. of Denver, Inc., 2840 S. Zuni Street, Denver, Colorado ("Seven-Up") from February, 1971 to the present.

4. Seven-Up is the local canner for Royal Crown Cola Company of Columbus, Georgia ("Cola").

5. On either Thursday, August 3, or Friday, August 4, 1972, following our normal procedure, I telephoned orders to Seven-Up for five truckloads of Royal Crown canned products. To the best of my recollection, I requested that one truckload be delivered on Monday, two on Wednesday, and two on Thursday of the following week.

6. Either on Monday, August 7, 1972, or Tuesday, August 8, 1972, the first truckload was received.

7. Two truckloads were scheduled to be received on Wednesday, August 9, 1972, the first of which was scheduled to be received at approximately 10:30 a.m., and the second at approximately 2:30 p.m.

8. When the first truckload was not delivered on schedule, I called Bob Grant, the warehouse foreman at Seven-Up, at approximately 11:00 A.M. To the best of my recollection, I asked Mr. Grant when the late truckload would be delivered, and he told me that it would be delivered when the truck to be used returned to town from either Colorado Springs or Grand Junction.

9. When the truckload had not been delivered by approximately 2:30 P.M., I again called Seven-Up and spoke to John Howell, Production Manager. He told me that he did not know whether Seven-Up had the facilities to fill the orders. He said he would call me later in the day.

10. At approximately 4:30 p.m. or 5:00 p.m. on that day, when the first truckload still had not been delivered, I again called Seven-Up and spoke to Bob Grant. I asked him when we could expect delivery of the two truckloads scheduled to be delivered that day. He told me he could not deliver the order of finished Royal Crown canned products because Bottling had been placed on a quota for the month of August and that we had already exceeded that quota.

11. I asked Mr. Grant what the quota was and he said he did not have the figures and that he did not know. He further stated that he was sorry about this.

12. Despite my efforts to do so, I was unable to learn the exact number of cans in the August quota until approximately August 25, 1972.

13. On August 9, 1972, at approximately 9:00 p.m., I attempted to call Mr. John M. Alden, President of Bottling, in Washington, D.C. at the Executive House, to relay this information to him; however, I was unable to reach him. Mr. Alden was in Washington to testify before the United States Senate Antitrust and Monopoly Subcommittee hearings on the soft drink exclusive territorial franchise areas.

14. I again attempted to reach Mr. Alden in Washington on August 10, 1972, at approximately 8:30 P.M., Denver time. I spoke to Mr. Alden and told him that Bottling had been placed on a quota for the month of August. I told Mr. Alden that we had been shut off on cans, and that our orders were not being filled because a quota had been placed on the number of cans we could purchase through Seven-Up, and that we had already exceeded that quota for the month of August.

15. Mr. Alden asked me what the quota was. I told him I did not know, and Mr. Alden said we would discuss it when he returned to Denver the following day.

16. The four truckloads which I ordered on August 3 or August 4, 1972, were, in fact, never delivered during the month of August since we were told we had exceeded our qouta for that month.

17. To my knowledge, Bottling has never been placed on a quota by Cola before with respect to cans, filled cans, concentrate, syrup or other ingredients used in the manufacture of soft drinks.

Further affiant sayeth not.

JAMES E. HUNT.

ROYAL CROWN COLA CO.,
Columbus, Ga., October 4, 1972.

HON. PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly,
Washington, D.C.

DEAR SENATOR HART: In response to your letter of September 27, 1972, I state most emphatically that Royal Crown Cola Co. has not taken any disciplinary action whatsoever against Royal Crown Bottling Company, Denver, Colorado, as a result of the testimony of its President, Mr. John M. Alden, before the Senate Subcommittee on Antitrust and Monopoly.

Moverover, the statement in the September 13, 1972 *Washington Post* article that Mr. Alden was informed for the first time that his company had been placed on a quota on the "very day" that he testified before the Subcommittee is not true. In fact, Mr. Alden was informed by a Vice President of our company at a meeting on June 28, 1972, that his supply of filled cans of our beverages was thereafter limited.

This meeting was recorded on tape by Mr. Alden without our representative's knowledge. We were provided with that tape recording as a part of the discovery procedure in the suit filed by Mr. Alden's company against our company on September 1, 1972. The recording absolutely confirms that Mr. Alden was informed of the limitation as early as June 28, 1972, and that he did not learn of it on the "very day" of his testimony before the Subcommittee on Antitrust and Monopoly as reported by the *Washington Post*. A copy of the transcription of this tape is attached.

Indeed, in his prepared text, Mr. Alden himself testified before your Subcommittee on August 10, 1972, that he had already been "placed on a quota." We presume that this prepared text was filed with the Subcommittee staff prior to August 10.

We did not seek a formal retraction from the *Washington Post* since we did not deem it appropriate to litigate this matter in the newspapers while it was pending before a federal court. However, a statement pointing out the inaccuracies in the newspaper item was provided the National Soft Drink Association on Setpember 14, 1972, and permission was granted to the Association to forward copies to the Subcommittee. We understand that this was done.

The opportuinty now afforded to cooperate with the staff of the Subcommittee in further clarifying this matter is most welcome. Pursuant to your request, we designate Mr. Thomas B. Carr of the law firm of Kirkland, Ellis and Rowe, 1776 K. Street, N.W., Washington, D.C. 20006 (83–8400) to make any necessary arrangements for that purpose. Mr. Carr is fully familiar with this matter as his firm is representing our company in the litigation pending before the United States District Court for the District of Colorado.

With respect to this litigation, the Court on September 22, 1972, entered an order denying our Denver bottler's motion for a preliminary injunction which sought to prohibit us from limiting the amount of filled cans of our beverages we would supply him.

In its opinion and order, the Court made the following findings of fact among others:

"1. A major part of the requested soft drink supply will be distributed for sale outside the ten county Colorado restricted area and generally will be used to service California customers of plantiff.

2. In situations where plaintiff does not sell the product directly outside the ten county area, the product is sold by plaintiff to other local inter-twined companies operated by Mr. John M. Alden, president of plaintiff company, and in turn said companies sell outside the ten county area.

* * * * * * *

6. Plaintiff has sufficient inventory of defendant's canned beverages and other products to meet its needs, and to fulfill its contract obligations to defendant, within its ten county Denver exclusive license, having received in excess of 6,500 cases of filled cans in August, 1972, and having received 5,700 cases of filled cans during the first weeks of September, 1972, measured against plaintiff's estimate of average monthly sales demand within its area of 6,000 to 8,000 cases.

7. Defendant is agreeable to continue to perform its obligations to supply plaintiff with defendant's product for sale and is agreeable to continue to provide plaintiff with a sufficient supply of its products, canned beverages and others to permit plaintiff to fulfill contracts in the Denver ten county area.

* * * * * * *

12. To grant relief requested by plaintiff, would (a) enable plaintiff to operate in territories properly licensed to other licensees of defendant without restrictions; (b) plaintiff would at this juncture of the case potentially impair the organization of defendant's entire licensing system; (c) the order would potentially cause a ripple effect extending beyond plaintiff's ten county restricted area and beyond Colorado's borders into other areas thus affecting license privileges of other licensees in their contractual relationships with defendant."

The Court in its conclusions of law made the following observations among others:

"1. Plaintiff has not demonstrated a reasonable probability it will ultimately prevail or that it will ultimately be entitled to the relief requested in its motion for a preliminary injunction.

* * * * * * *

5. The mandatory injunction here requested would not maintain the *status quo* appertaining to the express terms of the licensing agreement, but more so by implementing a new contract would present an imbalance to the *status quo* to plaintiff's benefit and considerable detriment to defendant. The injunction would change the *status quo*.

* * * * * * *

8. Plaintiff's sale and distribution of the questioned product outside the ten county Colorado area, either by direct or indirect means, would infringe on other areas allotted by defendant to other licensees and would interfere with defendant's contractual relationship with said licensees to defendant's detriment and detriment of other licensees not parties to this litigation.

9. The licensing organization of all defendant's 300 licensees would be substantially affected by a preliminary injunction herein and said licensees who have expended funds to develop their local or regional trade would be adversely affected by this order.

10. Based on the totality of the considerations herein outlined, against the backdrop of applicable law, potential hardships and balancing the relative equities, the Court concludes that plaintiff's Motion for a Preliminary Injunction is not well taken and is expressly *Denied*."

We attach for your information a copy of the full text of the Court's opinion and order. The opinion and order confirm that our action in limiting the amount of our trademarked canned beverages which we would supply Mr. Alden's company was in response to Mr. Alden's efforts to secure from us quantities of canned beverages greatly in excess of the needs of his company's bottling business in its exclusive licensed area so as to enable it to distribute in the exclusive licensed areas of other Royal Crown bottlers and was not in response to the fact that Mr. Alden testified before the Subcommittee. It is also clear from the opinion and order that our company has continued to maintain the status quo during the pendency of this litigation by providing Mr. Alden's company with a sufficient supply of canned beverages and bottling concentrates to service its licensed area.

We appreciate the concern of the Subcommittee regarding the erroneous *Washington Post* article, and we will certainly cooperate with the Subcommittee staff in very way to demonstrate that our company has not taken, and would not take, any disciplinary action against anyone for testifying before a committee of Congress.

A copy of your letter and our reply is being sent to each of our licensed bottlers throughout the country.

Very truly yours,

W. C. DURKEE, *President*.

[From tape delivered Sept. 21, 1972, to Holme Roberts & Owen, from plaintiff's counsel]

WOLFE. (?) Me stodging (?) for Bill Smith.

ALDEN. Well, by the way you've been conducting yourself on the telephone calls.

WOLFE. John, yesterday, the day before—apparently you weren't in—yesterday I left a message and I called repeatedly.

ALDEN. You didn't call Monday—I've been in and out of the office all week so far.

WOLFE. I called Monday and I didn't leave word because I was traveling.

ALDEN. Well, if you called Monday, I didn't know about it. I got a message yesterday that you called.

WOLFE. Yeh, but, John, we are putting the bottlers being serviced by the canning plant here, on a quota, and that quota is 15% more than last year's sales.

ALDEN. I'm listening.

WOLFE. There's a letter in the mail, you may have received it (Alden: I've not received anything this morning) signed by Red Sinclair that cancels your contract with Mountain States. All cases purchased from Englewood will be delivered to your plant and to your plant only. There will be no pickups at the canning plant.

ALDEN. There never has been to my knowledge.

WOLFE. No, but they are cutting off all pickups, and all deliveries will be made to your bottling plant.

ALDEN. Well, apparently you're repudiating some of the statements made by your senior vice president.

WOLFE. Who's the senior vice president?

ALDEN. The man who was senior vice president at the time he (?) made the statements was a Mr. Lowe at the Broadmoor.

ALDEN. Do you have anything more to say? I'm listening.

WOLFE. I want to say that the condition of your market is atrocious. The product that you have out in the market place has [word can not be made out]. We're going to have the guy from the lab come in because——

ALDEN. We welcome that.

WOLFE. Good, because the product that's out in the market place isn't up to standard.

ALDEN. You have our specifications and——

WOLFE. Your development of this market this year is going down sharply. (Alden: We . . . not on Diet Rite— on Royal Crown.) The units of concentrates that you purchased this year are 530 (?) compared to 591 last year, year to date and the market is in bad shape.

ALDEN. It wasn't in too good shape when we bought the operation.

WOLFE. Oh, it wasn't in good shape, but is was in better shape than it is now.

ALDEN. Yes, but it had been at a very strong decline. That decline has been slowed down and deaccelerated and arrested. We have discussed with your people some of the problems here for 3½ years so it is no surprise to anybody where we sit at the moment; we also have one of the strongest Pepsi Cola bottlers in America and he has done a hell of a nice job.

WOLFE. He does a good job in the market place, on the other hand there is very little wheeling and dealing in this market. There is every opportunity in this market that there is in every other market; in fact, I can point out situations where Pepsi Cola bottlers are much stronger than they are in this market—Cincinnati, Ohio for instance, where our bottlers show good progress, excellent progess. Pepsi's wheeling and dealing, Coke is wheeling and dealing, and our bottlers are still showing excellent growth—that happens to be Pepsi's strongest, major market in the country.

ALDEN. Well, No. 1—When we came here 3½ years ago, the whole object was to increase the brand's position. It so happens that every year, including the first six months of this year, we have had more coop advertising money than all the brands combined. We have been fighting a battle—we've had lousy national advertising. We've had very anemic advertising support. All of which has to do with the——

WOLFE. John, you don't know of what you speak.

ALDEN. I know what I speak of. I wouldn't make the statement—I am not making any wild statements. These are calculated statements. Now, so far as what steps you're telling me that the letter in the mail you are taking—I am alerting you to the fact that you probably have evaluated where you stand in terms of restraint of trade, attempt to price fix which involved the reason why you pulled something with other canners and also a few unfair trade practices——

WOLFE. Attempt to price fix?

ALDEN. I merely made that statement. That's right—on the canning you told me that if the canners couldn't buy the $1.96, you were going to set it up with Seven-Up and that's what you did; also, there has been a bottler that has been selling a product in our so-called area and taken our glass, as well as selling the accounts. I have told you and Smith about it; I have told your area man and not a God damn thing has been done about that, so there are quite a few things where I think you fellows should be looking at a whole picture rather than giving it a sharp focusing. I have made my little speech. What do you intend doing to help build this market?

WOLFE. We have given you every opportunity. We have done the same—we have the same programs for you as we have with any other bottler.

ALDEN. That doesn't answer the question.

WOLFE. Our people have attempted—we have had good people following this operation.

ALDEN. Yes, I know you had some people from your Los Angeles operation. It cost us $10,000 in one month trying to tell us how to do a job of advance selling and just fouling things up. The record is pretty well set about how good your

people are and what performance has been and what our cooperative attitude has been.

WOLFE. So you're making a statement—who incidentally are you talking about—that relates to advance selling? It so happens, John, that I recall very vividly that I personally told you before you went into advance selling that if the bottler does not have very excellent control of a conventional sales system, that advance selling is pure chaos. I have told this to every * * *.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(Civil Action No. C–4288)

ROYAL CROWN BOTTLING CO., a Colorado corporation, PLAINTIFF,

v.

ROYAL CROWN COLA CO., a corporation, DEFENDANT

APPEARANCES

For the Plaintiff: Charles F. Brega, Esq., Hindry & Meyer, 2301 First National Bank Building, Denver, Colorado 80202.

For the Defendant: Donald C. McKinley, Esq., Holme Roberts & Owen, 1700 Broadway, Suite 1010, Denver, Colorado 80202. James H. Wallace, Jr, Esq., Thomas B. Carr, Esq., Kirkland, Ellis & Rowe, 1776 K. Street NW., Washington, D.C. 20006. Of Counsel, Nolan Murrah, Jr., Esq., 1000 10th Avenue, Columbus, Georgia.

OPINION AND ORDER

FINESILVER, JUDGE

The Court has considered the pleadings, citations of authorities of counsel, testimony elicted at the hearing held on September 8, 1972 on Plaintiff's Motion for Preliminary Injunction, exhibits, and deposition of Mr. John M. Alden, principal officer of Plaintiff, and the Court has pursued independent legal research.

The Court being advised in the premises finds that the Motion for Preliminary Injunction is not well taken and is DENIED.

BACKGROUND OF THE CASE

On September 1, 1972, Royal Crown Bottling Co. (Plaintiff-Licensee) filed its complaint and motions seeking a Temporary Restraining Order, a Preliminary and Permanent Injunction requiring Royal Crown Cola Co. (Defendant-Licensor) to supply Plaintiff "with all of the filled cans of defendant's brand of soft drinks . . . the plaintiff requires" and seeking damages "in an amount not to exceed $1,000,000.00 plus interest and attorney's fees."

Plaintiff bases its claim for relief on alleged violations of the anti-trust laws of the United States and on an alleged breach of contract; the action arises under Title 15, U.S.C. sec. 1, 2, 15, 26 and 45; the amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs and the Court has jurisdiction over the parties and subject matter by virtue of diversity of citizenship between the parties and because the case arises under the statutes of the United States.

Plaintiff, a Colorado corporation since 1968, is in the business of canning, bottling and distributing soft drinks pursuant to franchise agreements with defendant, a Georgia corporation.

The franchise agreements with defendant contain restrictions prohibiting plaintiff from selling soft drinks produced under the agreements outside or "without" the licensed territory (ten Colorado counties, including Denver) and from selling the soft drinks to any person who will sell them outside the described territory.

Defendant is engaged in the business of selling concentrates or syrups for the manufacturing and mixing of bottled and canned soft drinks under one or more of its trademarks, i. e. "Royal Crown", "Diet Rite", "Nehi", and is also in the business of selling such canned soft drinks to distributors or franchisees located throughout the United States. Defendant also is engaged in the business of bottling soft drinks in several company-owned plants located elsewhere in the United States.

Plaintiff contends that in August 1972, defendant, arbitrarily and without prior notice to plaintiff, set quota limits on the number of cans of soft drinks that

plaintiff could purchase through the defendant and its agent, Seven-Up Bottling Co.*

The setting of the quota gave rise to this action and claim of plaintiff for immediate relief.

Plaintiff contends that it is suffering immediate and irreparable harm as a result of the acts of the defendant in establishing an arbitrary quota and in enforcing the territorial and customer restrictions in the franchise agreements in that (1) plaintiff is losing sales of the products involved; (2) plaintiff is prevented from filling orders that have been placed with it; (3) plaintiff is prevented from supplying customers with the products involved; (4) plaintiff is losing a competitive advantage in the marketplace; (5) plaintiff is not able to stock shelf space in supermarkets because of a lack of supply of the franchised canned beverages, and it is losing such shelf space in supermarkets; (6) plaintiff had acquired such shelf space at great cost and expense; (7) plaintiff is losing valuable employees with a consequential deterioration of its route sales; (8) plaintiff has been forced to remove vending machines from certain locations because of its inability to keep them filled with franchised beverages; (9) plaintiff has had to keep much of its truck fleet idle; (10) plaintiff is unable to use certain of its office space because of the reduction in its business; (11) plaintiff is in danger of losing a substantial investment in its business.

Plaintiff further contends that unless the defendant and its agents, servants and employees are enjoined from maintaining the arbitrary quotas it has established and from enforcing the territorial and customer restrictions in the franchise agreements, the plaintiff will continue to suffer irreparable and immediate harm and damage; further that plaintiff has no plain, speedy and adequate remedy at law.

Defendant contends that plaintiff is not entitled to the extraordinary relief requested i.e. preliminary injuction.

1. A major part of the requested soft drink supply will be distributed for sale outside the ten county Colorado restricted area and generally will be used to service California customers of plaintiff.

2. In situations where plaintiff does not sell the product directly outside the ten country area, the product is sold by plaintiff to other local inter-twined companies operated by Mr. John M. Alden, president of plaintiff company, and in turn said companies sell outside the ten county area.

3. Plaintiff's current sales and profits in relation to defendant's products are at levels in excess of prior years.

4. Sales by plaintiff of Royal Crown trademarked products (cans only as distinguished from cases of bottles) reflect that each year defendant supplied plaintiff with a substantial increase of canned beverages over previous years.

	Cases of cans
1968	44, 049
1969	35, 151
1970	41, 711
1971	81, 479
1972, (1st 7 months)	117, 000

5. Mr. Alden, at his deposition, indicated that plaintiff's projected future needs for canned products is as follows:

Licensee's Estimate of Can Requirements to Supply Exclusive 10 County Licensed Denver Area, "California Customers," and Miscellaneous Other Areas:

35,000 to 40,000 cases	September 1972.
35,000 to 40,000 cases	October 1972.
35,000 to 40,000 cases	November 1972.
35,000 to 40,000 cases	December 1972.

Licensee's Estimate of Can Requirements to Supply Exclusive 10 County Licensed Denver Area plus Miscellaneous other Areas:

8,000 to 10,000 cases	September 1972.
8,000 to 10,000 cases	October 1972.
8,000 to 10,000 cases	November 1972.
8,000 to 10,000 cases	December 1972.

*The Seven-Up Bottling Co., Denver, Colo., is not a party to this litigation. They have the contract with defendant to receive the syrups and drink concentrate from defendant's shipping point in California and to can soft drinks for and on behalf of plaintiff pursuant to license agreements between plaintiff and defendant.

6. Plaintiff has sufficient inventory of defendant's canned beverages and other products to meet its needs, and to fulfill its contract obligations to defendant, within its ten county Denver exclusive license, having received in excess of 6,500 cases of filled cans in August, 1972, and having received 5,700 cases of filled cans during the first weeks of September, 1972, measured against plaintiff's estimate of average monthly sales demand within its area of 6,000 to 8,000 cases.

7. Defendant is agreeable to continue to perform its obligations to supply plaintiff with defendant's product for sale and is agreeable to continue to provide plaintiff with a sufficient supply of its products, canned beverages and others to permit palintiff to fulfill contracts in the Denver ten county area.

8. Defendant's exclusive license agreement with plaintiff and its policies pursuant thereto are substantially identical with its exclusive licenses and policies with respect to some 300 other licensees of defendant throughout the United States. Plaintiff does not claim discriminatory treatment.

9. Mr. John Norton, a licensee of defendant in the Chico, California area (an exclusive licensee within a restricted California area) testified that Royal Crown canned beverages—not prepared or canned in the Chico, California area—are surfacing in that locality and Chico area distributors are confronted with several sources in which to purchase said product.

10. Mr. Norton testified that he has invested over half a million dollars in acquiring and developing the tradename of defendant in his exclusive licensed area and he would be seriously injured if another licensee or distributor were permitted to ship defendant's trademarked products to Chico, California.

11. Further Mr. Norton testified that if plaintiff were permitted by order of this Court, or otherwise, to ship defendant's trademarked products to Chico, California, plaintiff would unconscionable benefit from Norton's extensive advertising and promotional activities of the Royal Crown tradename in Chico.

12. To grant relief requested by plaintiff, would (a) enable plaintiff to operate in territories properly licensed to other licensees of defendant without restrictions; (b) plaintiff would at this puncture of the case potentially impair the organization of defendant's entire licensing system; (c) the order would potentially cause a ripple effect extending beyond plaintiff's ten county restricted area and beyond Colorado's borders into other areas thus affecting license privileges of other licensees in their contractual relationships with defendant.

13. Defendant is in a stable financial posture to pay any money judgment entered against it.

14. Plaintiff's damages are calculable and plaintiff has an adequate remedy at law.

15. To grant plaintiff's requested relief at this puncture of the case would have the effect of the Court nullifying and altering the plain terms of the licensing agreement between plaintiff and defendant and implementing a new contractual relationship on terms at variance to the parties written contract.

16. While plaintiff has introduced testimony of impairment to business operations if additional canned beverages are not obtained to serve customers beyond the ten county area, plaintiff has not established economic collapse to his business if the requested relief is not granted.

Law

Plaintiff's contention may be summarized to the effect that the Court should decide the basic issues in this case now and hold the licensing contract invalid and thus afford plaintiff effectively all relief it might obtain should plaintiff ultimately prevail on the merits. In brief, plaintiff urges the Court to enjoin the defendant from activity allegedly in violation of the anti-trust laws of the United States. The law applicable to injunctive relief generally and anti-trust in particular, does not support plaintiff's position.

In its request for a preliminary mandatory injunction, plaintiff has the burden to establish its entitlement thereto against a backdrop that this relief is an extraordinary provisional remedy.

I.

Main factors considered in granting or denying preliminary injunctions *pendente lite* are:

1. The probability that plaintiff will ultimately prevail.
2. Whether the injunction is to maintain the *status quo* or to change it.
3. Whether plaintiff's injury is really irreparable or damage will be suffered.

4. The movant has no adequate remedy at law.

5. Degree of hardship to the defendant during the course of the litigation resulting from entry of the order.

6. Movant has established circumstances that movant is deserving of injunctive relief and has shown that the equities are balanced in its favor.

The function of a preliminary injunction is to prevent immediate and irreparable injury and damage and to preserve the *status quo* until the case can be considered in its entirety; it is not a means for obtaining a disjointed and piecemeal adjudication of the merits. *Meiselman* v. *Paramount Film Dist. Corp.* 180 F.2d 94, 96 (4th Cir. 1950).

In order to properly dispose of the factual and legal issues inherent in this litigation, all facets of the case must be thoroughly examined and extensive relevant material presented and subjected to judicial analysis. Also the question of good faith of the parties is a proper consideration in a determination whether a preliminary injunction should be granted. 7 Moore, Federal Practice, Section 65.18(3), p. 1690 (1970). Federal courts have adhered to the proposition that the district court must consider the relative hardships to both parties in exercising its equitable discretion upon an application for a preliminary injunction. *Northwest Industries Inc.* v. *B. F. Goodrich Co.*, 301 F. Supp. 706 (N.D. Ill 1969).

It is not possible to predict at this time which litigant will prevail and such decision must be withheld until such time as issues are joined, discovery completed, and trial held.

It is plaintiff's principal contention that licensing restrictions as here involved are *per se* violations of the anti-trust laws of the United States and constitute vertical and horizontal * restraints of trade and commerce.

Where questions of vertical and horizontal restraints are issues in an anti-trust case, the legality thereof "should be determined only after a trial." *White Motor Co.* v. *United States*, 372 U.S. 253, 261, 9 L.Ed.2d 738, 835 S.Ct. 696, (1963).

The *White* case is strong authority for the proposition that full scale evidentiary hearing is required. See also. *Sandura v. FTC*, 339 F.2d 847, (6th Cir. 1964); *Snap-on Tools Corp. v. FTC*, 321 F.2d 825 (7th Cir. 1963).

A key case in this controversy is *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 18 L.Ed.2d 1249, 87 S.Ct. 1856 (1967). The trial of this case involved several pivotal questions to the instant action. The trial in this noteworthy case lasted seventy days.

II.

Merits of the case need not be decided in considering whether to grant a preliminary injunction. In *Dymo Industries Inc. v. Tapeprinters, Inc.*, 326 F.2d 141, (9th Cir. 1964) the Court noted:

> [O]n application for preliminary injunction the Court is not bound to decide doubtful and difficult questions of law or disputed questions of fact. (326 F.2d at 143)

This case abounds with close questions of law and disputed facts and trial is necessary to fully analyze the pros and cons of the licensing restrictions against the backdrop of conflicting legal interpretations of legal precedent.

By way of illustration, legal principals to be considered in anti-trust litigation include:

1. Whether provisions of the franchise agreements between defendant and plaintiff are *per se* illegal and violative of the anti-trust laws and whether the agreements constitute vertical and horizontal restraints of trade and commerce.

2. Whether the *per se* test is applicable or whether a "rule of reason" should be applied, by weighing the reasonableness of the challenged restrictions in light of their economic justifications and their actual (not implied or imagined) effect on competition.

3. Do the licensing agreements between plaintiff and defendant have an effect or intend to have an effect to defeat or lessen competition or is there anything included in said relationship that constitutes an unreasonable restraint of trade.

The field of anti-trust litigation as it relates to the legality of exclusive representations and territorial restrictions in licensing is unclear and subject to fine line distinctions. A careful analyzation of principal case precedent and development of facts relating thereto is necessary to bring the instant litigation into focus for resolution.

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*Vertical restraints of trade (including vertical territorial and customer restrictions) are those imposed upon distributors by manufacturers; horizontal restraints (and restrictions) are those agreed to among the distributors themselves.

The lack of clarity in the law militates against the relief requested by plaintiff in its request for a preliminary injunction. In this regard, the Court's research reflects the following authorities have potential bearing on the issues of this case* and must be considered and analyzed. *United States v. Arnold, Schwinn & Co., supra;*** *White Motor Co. v. United States, supra; United States v. Sealy, Inc.* 388 U.S. 350, 18 L.Ed.2d 1238, 87 S.Ct. 1847 (1967); *United States v. Topco Associates, Inc.*, 319 F.Supp 1031 (N.D. Ill 1970) prob. juris. noted. 39 U.S.L.W. 3455, (U.S. April 19, 1971) (No. 70–82); *The Coca-Cola Bottling Co. v. Coca-Cola Co.*, 269 Fed 796 (D.Del L920); *Sandura Co. v. FTC, supra; Snap-on Tools Corp. v. FTC, supra;* and *Albrecht* v. *Herald Co.*, 390 U.S. 145. 19 L. Ed. 898, 88 S.Ct. 869 (1968). See also *Tripoil Co. v. Wella Corp.* 425 F.2d 932 (3rd Cir. 1970); *United States v. Glaxo Group Ltd.*, 302 F.Supp 1 (D.D.C. 1969), probable jur. noted. 405 U.S. 914 (1972); *Mississippi Valley Gas Co. v. FPC*, 398 F.2d 395 (5th Cir. 1968); *Carter-Wallace, Inc. v. United States* 449 F.2d 1374 (Ct Cl. 1971); *La Fortune v. Ebie*, 1922 Trade Cas No. 74,090 (Cal Dist Ct App. 1972.) (92,486) and others.

III.

The Court is not unmindful of matters pending before the Federal Trade Commission and United States Senate on questions bearing a relationship to the subject matter of this controversy* * *

On July 15. 1971, the Federal Trade Commission issued a series of complaints against the major soft drink manufacturers, including Royal Crown, alleging that exclusive territorial restrictions governing the operations of their franchised soft drink bottlers are unlawful under Section 5 of the Federal Trade Commission Act.

The FTC complaints allege that the territorial restrictions are unlawful, both under *per se* rules of illegality (i.e., without regard to their competitive effect), and under the "rule of reason," requiring an economic inquiry to determine whether the restrictions are unreasonable in light of the peculiarities of the soft drink market.

In their responses to these complaints. the soft drink manufacturers contended. among other things. that the FTC proceedings were deficient in that the parties whose interests were most directly involved—the franchised bottlers—had not been joined as respondents. To allow the bottlers an opportunity to present their views, the FTC hearing examiner accorded them intervenor status. The FTC posture is readying a full exposition of the complex legal and economic issues raised by the FTC complaints.

Further on July 31, 1972, the FTC staff moved for a summary judgment of illegality on the *per se* theory. This motion is currently pending before the FTC hearing examiner.

Parallel to this action in the United States Senate, five bills are pending that would grant soft drink manufacturers and franchised bottlers an anti-trust exemption for the challenged territorial restrictions. (S.B. 3040, S.B. 3116, S.B. 3133, S.B. 3145. and S.B. 3587).

These bills would amend the Federal Trade Commission Act to provide that nothing in that Act or any of the anti-trust laws shall make certain exclusive territorial arrangements involving food products unlawful. These bills, if enacted, provide anti-trust immunity for restrictive vertical territorial agreements.

CONCLUSIONS OF LAW

1. Plaintiff has not demonstrated a reasonable probability it will ultimately prevail or that it will ultimately be entitled to the relief requested in its motion for a preliminary injunction.

2. The legal principles inherent and controlling in this litigation are not clear; they are subject to varied interpretations and the Court at this juncture of the case is not prepared to rule on the far-reaching legal questions.

3. There are disputed factual issues and the Court is not bound to decide said issues on motion for preliminary injunction. The legal issue upon which plaintiff bases its cause of action require decisions and interpretations of the law and development of facts prior to complete adjudication of issues at trial.

4. Preliminary mandatory injunctions should be granted in only extraordinary cases and such a case is not here established.

*The list is illustrative only and by no means complete.

**The majority opinion in the Schwinn case has been the subject of considerable criticism among legal writers and has been a frequent subject of law review articles dealing with

***In its ruling herein, the Court has not considered the unrelated proceedings. The proceedings, however, point up activity in the field of anti-trust law.

5. The mandatory injuntcion here requested would not maintain the *status quo* appertaining to the express terms of the licensing agreement; but more so by implementing a new contract would present an imbalance to the *status quo* to plaintiff's benefit and considerable detriment to defendant. The injunction would change the *status quo.*

6. Plaintiff has not demonstrated that it will be irreparably injured if the Court denies the motion for mandatory injunction; further plaintiff has an adequate remedy at law. Injury or damage, if any, is readily calculable or compensable in money.

7. The relief plaintiff seeks would involve an adjudication of many of the factual and legal matters in issue and a preliminary injunction would grant plaintiff substantially the relief requested in its ultimate claim for relief on the merits.

8. Plaintiff's sale and distribution of the questioned product outside the ten county Colorado area, either by direct or indirect means, could infringe on other areas allotted by defendant to other licensees and would interfere with defendant's contractual relationship with said licensees to defendant's detriment and detriment of other licensees not parties to this legislation.

9. The licensing organization of all of defendant's 300 licensees would be substantially affected by a preliminary injunction herein and said licensees who have expended funds to develop their local or regional trade would be adversely affected by this order.

10. Based on the totality of the considerations herein outlined, against the backdrop of applicable law, potential hardships and balancing the relative equities, the Court concludes that plaintiff's Motion for a Preliminary Injunction is not well taken and is expressly *Denied.*

This Order satisfies the requirement of Rule 52, Federal Rules of Civil Procedure.

Dated at Denver, Colorado, this 22 day of Septemper, 1972.

By the Court:

SHERMAN G. FINESILVER,
Judge, U.S. District Court.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(Civil Action No. C–4288

ROYAL CROWN BOTTLING COMPANY, PLAINTIFF *v.* ROYAL CROWN COLA COMPANY, DEFENDANT

DEPOSITION OF JOHN MALCOLM ALDEN

(Taken by Defendant)

Pursuant to notice, the deposition of JOHN MALCOLM ALDEN, called for examination by the defendant herein, was taken at 1000 Denver U.S. National Center, 1700 Broadway, in the City and County of Denver, State of Colorado, beginning at the hour of ten o'clock in the forenoon of the 7th day of September, 1972, before Bertram Naster and Thomas T. Tomko, Certified Shorthand Reporters and Notaries Public in and for the State of Colorado;

The plaintiff appearing by its attorneys, Hindry and Meyer, by Charles F. Brega;

And the defendant appearing by its attorneys, Holme, Roberts & Owen, by Mr. Donald C. McKinlay, and Kirkland, Ellis & Rowe, of Washington, D. C., by Mr. James H. Wallace, Jr., and Mr. Thomas B. Carr.

Whereupon, the following proceedings were had:

Mr. WALLACE. Mr. Bregs, to save time, since we are starting about a half hour late, we would be willing to stipulate that your objections to form could be preserved if you think that might expedite the deposition.

Mr. BREGA. Well, do you want to reserve all objections until the time of trial or use?

Mr. WALLACE. Yes, that's what I was proposing.

Mr. BREGA. All objections, then, will be reserved until the time of trial or use of the deposition.

Before we start, the record should reflect, since there has been no entry of appearances of these gentlemen—are you gentlemen going to enter your appearance on behalf of the defendant in this action?

Mr. McKinlay. Yes, we will ask the Court, I will ask the Court tomorrow to permit these gentlemen, Mr. James Wallace and Mr. Thomas Carr, of the firm of Kirkland, Ellis & Rowe, in Washington, D. C. to be admitted for purposes of this case, and I assume the Court will grant the request. So there will be three appearances entered for this deposition, Mr. Wallace, Mr. Carr, and Mr. McKinlay.

JOHN MALCOLM ALDEN, called for examination by the defendant herein, being first duly sworn, testified as follows:

EXAMINATION

By Mr. Wallace:

Q. Sir, would you state your full name for the record.

A. John Malcolm Alden.

Q. Would you state your date of birth and place of birth.

A. Boston, Massachusetts, 1911, March 19th.

Q. Would you summarize very briefly your educational background.

A. Well, I started with pre-med and ended with journalism. I started at the University of Pennylvania college, and ended in the School of Journalism at the University of Wisconsin.

Q. Did you earn any college degrees, sir?

A. No, sir.

Q. Would you state whether you had any work experience other than odd jobs, prior to your leaving college.

A. No.

Q. Would you explain your work background very briefly, from the date at which you can state that you left college until the present.

A. I started with the Carnation Company after leaving college in 1931, as assistant to the Advertising Director; and then, on sales promotion, was put in charge of the medical feeding program, infant feeding, and then went into the advertising agency business. I had my own agency, which merged into another agency, and I worked on the soft drink account.

From there I went to another agency handling the California industry—wine industry advertising program.

Q. Now, sir, how long did you have your first agency after you left Carnation? Could you state the beginning and the ending dates, approximately?

A. Well, it was about an intermediate period of about a year and a half.

Q. Starting at approximately what year, sir?

A. '34 or '35.

Q. And what was the name under which that agency traded, sir?

A. The Alden Company.

Q. Now, what advertising agency did that merge into, sir?

A. Batten, Barton, Durstine and Osborn.

Q. And how long were you with B.B.D. & O.?

A. Approximately two years.

Q. So this would have been from about 1936?

A. I think 1938—'37 to '39.

Q. And which soft drink account did you work on at that company?

A. Royal Crown Cola, Ne-Hi and Party-Pak.

Q. Were you the account executive in charge of that account?

A. I was on the West Coast, and I was working with the Vice President in charge of Western Operations, on national programing which was used by the agency. The account was headed out of New York by Bruce Barton and Alex Osborn.

Q. When you left BBDO whom did you go with?

A. J. Walter Thompson.

Q. Where were you located with them, sir?

A. Los Angeles and San Francisco.

Q. How long were you with them, sir?

A. Five-plus years.

Q. Until approximately 1944?

A. Yes.

Q. And what did you do in 1944, sir?

A. Well, at the end of 1944 I joined the Biow Company.

Q. Would you explain briefly the operations of the Biow Company?

A. Well, it was the fifth or sixth largest agency in the country. It had prime accounts ranging from Phillip Morris cigarettes, Proctor and Gamble, Lady Esther Cosmetics, Eversharp, Schenley Whiskys, Roma Wines, CBA Division.

Q. Now, where were you located with that company?

A. I was vice-president in charge of western operations headquartered in San Francisco.

A. And that was beginning in about 1944?

A. That was at the end of 1944.

Q. Until what date?

A. 1950.

Q. What did you do in 1950, sir?

A. Well, I was in San Francisco for about two-and-a-half years, three years. I was shuttling back and forth from New York. And I became executive vice-president of the Biow Company.

Q. I think maybe you misunderstood my question. I thought you said you left the Biow Company in 1950.

A. That's correct. But during the period I was with them, I was vice-president in charge of the West Coast operation, and then I went to New York as executive vice-president of the company.

Q. But when you left the Biow Company in 1950, what did you do?

A. I had a management consultant firm.

Q. What was the name of that firm?

A. John M. Alden, Incorporated.

Q. Where was that located, sir?

A. Nine East 48th Street, New York City.

Q. How long did you continue with that management consultant firm?

A. Oh, that management consultant firm continued actively and inactively until about two or three years ago.

Q. Did the corporation cease to exist?

A. It ceased to exist in 1971. It was inactive since 1968–'69.

Q. Were the offices always located at Nine East 48th Street?

A. That's where they were during the active dates.

O. What were the time periods in which the office was located on 48th Street?

A. 1950 or 1951 until 1955.

Q. Where were the offices moved to in 1955?

A. I moved to an address in Flushing, Long Island.

Q. Do you recall the address in Flushing?

A. I do not.

Q. How long did the offices stay in Flushing, Long Island?

A. Until 1959.

Q. And where did the office move to after 1959?

A. Northern California.

Q. What city?

A. Menlo Park and Redwood City.

Q. Both cities at the same time or—

A. No, not concurrently. First Menlo Park was a temporary office there and then we got an accommodation at Redwood City.

Q. How long did the office stay in Redwood City?

A. Until it was inactivated in 1969.

Q. Was the firm a corporation or was it a sole proprietorship or some other firm?

A. John M. Alden, Incorporated.

Q. It was incorporated?

A. That was the company that we started with at Nine East 48th.

Q. Did that corporation have any activity from 1969?

A. No. It was inactive.

Q. Did it make any profit during those periods?

A. No. It was inactive.

Q. During this period that you were with John M. Alden, Incorporated, were you engaged in any other endeavors?

A. Yes.

Q. Beginning when, sir?

A. Well, we were engaged in one activity in 1953.

Q. What was that, sir?

A. A client we were servicing.

Q. Who was servicing?

A. John M. Alden, Incorporated was servicing a client.

Q. No. I think you misunderstood me.

A. No, I didn't.

Q. Apart from John M. Alden, Incorporated, apart from that operation, were you engaged in any endeavors after 1950?

A. My response was yes, in 1953.
Q. And what was that endeavor, sir?
A. A client.
Q. Aside from clients of John M. Alden, Incorporated.
A. Would you state your original question?
Q. My question, sir, is other than your activities associated with John M. Alden, Incorporated, were you engaged in any other endeavors or were you employed by anyone else?
A. I said yes, a client.
Q. A client of John M. Alden?
A. John M. Alden, Incorporated.
Q. You mean you were employed by them on their payroll as opposed to the consulting——
A. As well as the agency.
Q. Now, what was the name of that client?
A. Munson, Incorporated.
Q. Now, what was your position with them, sir?
A. I was drafted to be president.
Q. Would you explain briefly what the operations of Munson, Incorporated are?
A. They were the world's largest producer of greeting cards and gift wrappings under private label, producing for accounts like Woolworth's, Sears-Roebuck, Kresge.
Q. How long were you with Munson, Incorporated?
A. Two-plus years.
Q. Any other endeavors after 1950, sir?
A. Just clients.
Q. On behalf of John M. Alden, Incorporated?
A. Yes.
Q. Now, after the period that Alden, Incorporated ceased to be active, which you said was around 1968 or '69—is that correct?
A. Yes.
Q.—what did you next do?
A. I went into the soft-drink business.
Q. Was that in the Denver area, sir?
A. Yes.
Q. Would you state for the record all corporations, partnerships or other business organizations which you had been affiliated with since January 1, 1968?
A. Would you restate that question?
Q. Would you state for the record any corporations or partnerships or business organizations with which you have been an officer or director or an employee since January 1 of 1968?
A. Well, Royal Crown Bottling Company.
Q. Any others?
A. Interstate Beverage Company.
Q. Any others?
A. No other active firm.
Q. Any inactive companies?
A. No.
Q. Are you a representative in any capacity as an agent, sales representative or in any other capacity for any other companies since January 1, 1968?
A. At any time? Will you restate that? I'm not able to follow you.
Q. Have you represented any other companies in any way since January 1, 1968?
A. As an employee, director or officer? I said no.
Q. Or perhaps in some other capacities such as sales representative or consultant or in any other capacity.
A. Well, I have consulted on quite a few things in the past years ranging from Mexican foods, other food specialties, other soft drinks, and recently set up a corporation which is structuring a thing in the future, so it has nothing to do with the past.
Q. Sir, approximately how many different companies have you represented in some consulting capacity since January 1, 1968?
A. I don't recall.
Q. Would you say it was more or less than twelve?
A. It would be less than twelve.
Q. Would it be more or less than six?

A. I wouldn't go all the way down the numbers. I would say in the area between three, four, five, six.

Q. Three to six?

A. Three and less than six.

Q. Do you recall the names of any of these companies, sir?

A. In the consulting capacity?

Q. Yes, sir.

A. Well, I consider in my own professional consulting capacity there would be a fee paid. So let's put it in more social chatting.

Q. Well, I'm a little bit confused. I thought you testified just a few moments ago that you consulted in connection with some Mexican foods.

A. That's right. I didn't get a fee for it.

Q. What was the name of the company involved in that consultation?

A. That's a company I was planning to set up myself.

Q. Did you in fact set up that company?

A. It hasn't been activated yet, no. We have merely been exploring market potential and rank competition, attitude of the supermakets in terms of reception of the products of these types.

Q. When did you first begin your activity in connection with this Mexican foods venture?

A. I don't know what you characterize as "activity." Do you mean probings?

Q. Well, why don't you tell me what the activity is.

A. Well, there is no activity. During the past several decades we have continuously made studies of various food product classifications and food chains. The purpose of that was to determine whether there might be some product opportunities from the standpoint of brand competition. And in that area we have been studying the Mexican food situation for a number of years. At our own expense we have investigated the public feeding habits or menus of some of the leading companies that provide foods for colleges, hotels, restaurants, institutional areas such as hospitals, and have been trying to develop possible sources of supply for packaging our own label, investigating the possibility of buying our own equipment.

Q. And this is all in connection with the Mexican food, is that correct?

A. No. This is a continuing thing that I have been doing as a marketing man interested in areas of opportunity. This is what led us to the soft-drink business.

Q. Would you say that your continuing studies relating to the Mexican foods venture are of a superficial nature or would they be of a sophisticated nature?

A. I don't know what your terms are, but I would say the total efforts and moneys expended were minimal, if that answers your question.

Q. Well, I would like specifics rather than generalities. Who is it you were considering setting up the Mexican foods venture with?

A. I told you I was looking at it in terms of an operation I was going to get into.

Q. Well, I'm sorry. You used the term "we," and you perhaps——

A. I use the term "we" meaning myself and/or other associates possibly.

Q. Have you talked to other potential associates in connection with this Mexican foods venture?

A. Not too seriously.

Q. Have you talked with them in any manner

A. I may have had some social chats with friends of mine.

Q. Was there any discussion with these friends of yours about financing such a venture

A. That was premature.

Q. Was the discussion with them as to whether they would enter into such a venture with you?

A. There was some interest.

Q. Do you recall the names of the friends that you discussed this with?

A. No, because it covered a wide spectrum of people I knew.

Q. Did it cover any people who are associated in any way with your various soft drink operations?

A. No, I'd have no reason to discuss anything with any of the associates in the soft drink business.

Q. Now, you mentioned that you also had done consulting work since January 1, 1968, in connection with other food specialties. Do you recall any particular food in that connection?

A. Yes, we were exploring the beef jerky market.

Q. Any others, sir?

A. Some of the gourmet foods, specialty foods.
Q. Do you recall which gourmet foods, sir, specifically?
A. Well, there was one company that is inactive; we were thinking of possibly activating it.
Q. Which company was that, sir?
A. A company called Penthouse Foods.
Q. Penthouse Foods?
A. Yes, sir.
Q. Who owns that company, sir?
A. I don't know where it sits now. I don't know if it is alive or not.
Q. Well, at your best information, as last you heard, who owned the company, sir?
A. Family.
Q. Whose family, sir?
A. My family.
Q. Your family. What efforts went into your studies regarding the possible resurrection of Penthouse Foods?
A. Field studies, supermarket chains, inquiries, checking the store shelves, talking with store managers on product classifications.
Q. Who assisted you in these studies, sir?
A. I did the field work myself.
Q. Was your field work confined to the Denver area or was it broader-based than that, sir?
A. It was really high-spotted around the country—the West Coast, here, the East Coast, the Southeast.
Q. Any other areas?
A. Of the country?
Q. Yes, sir.
A. No.
Q. Any other gourmet food ventures, other than Penthouse Foods, considered worked on by you since January 1,
A. None actively.
Q. Any in some other stage of development? I am not quite sure what you mean by "active," so I will have to expand on that.
A. Well, I may have been reading some books and trade journals, doing some research, getting some figures together, which I do not consider "actively." I consider that a hobby.
Q. Do you recall what areas you studied as a hobby in connection with gourmet foods, other than the Penthouse Foods venture?
A. As I have said, I was exploring the growth and development of various brands in the field, noticing the changes between the distribution pattern which existed some years ago, through fine food stores, and moving in through supermarkets, either through rack jobbers or on direct purchase basis, trying to get the pulse of the thing, on the scene, myself.
Q. This was in connection with which foods, sir?
A. All the product classifications that I was interested in, which were dry grocery items.
Q. You were interested in all dry grocery items?
A. And some non-food items.
Q. Which non-food items were you interested in, sir?
A. Well, we looked one time at the charcoal situation. We were evaluating the pet field. I guess we looked at the cat litter market.
Q. Any others since January 1, 1968, sir?
A. Not that I recall.
Q. What kind of studies or endeavors were you associated with in connection with your charcoal investigation?
A. Well, we were trying to determine the size of the market, the potential growth factors, available sources of supply in this country, and we were probing what might be available out of Taiwan.
Q. Did your study in the charcoal venture confine itself to activities by you here in the Denver area, or did you broaden the scope of your studies, sir?
A. I didn't say we did this in the Denver area.
Q. Well, I may have misunderstood you. Where did the study take place on the charcoal venture?
A. On the West Coast.
Q. Where on the West Coast, sir?

A. Well, all over the West Coast. I mean, some of the work was done in my home, some of my work was done in my office, and my field work was done anywhere between Seattle and Los Angeles.

Q. Did anyone assist you in the charcoal venture?

A. I may have talked to several brokers to find out what they knew about accounts that they had.

Q. This was in the form of interviews that you conducted of——

A. Might have been telephone conversations, it might have been at a cocktail bar, and it might have been socially visiting with someone that lived near me.

Q. I see. Would you describe very briefly your pet field studies since January 1, 1968.

A. I didn't make any of these studies except on the gourmet foods and Mexican foods, in '68.

Q. Since January 1, '68.

A. At the time we bought the Royal Crown operation, is that what you are talking about, or——

Q. Well, I am talking about what you did in the pet field since January 1, 1968.

A. I used that as an illustration, that it was one of the dry grocery product classifications that we were looking at and studying.

Q. Now, were your studies in the pet field confined to Denver or were they over a broad——

A. Had nothing to do with Denver. They were also on the West Coast.

Q. This was a corporation you were investigating on the West Coast?

A. No, this was something I was doing with my interest in various products, which I had been doing for about two decades.

Q. Could you describe briefly at what locations on the West Coast your studies in the pet field took place.

A. The same as the previous—in my home, in my office, and when I would make field trips.

Q. Would you explain whether anyone assisted you in your pet field ventures, since January 1, 1968.

A. My answer is the same as the previous question—no.

Q. Now, would you describe very briefly what work you did since January 1, 1968, in connection with the cat litter project.

A. Same as the dog food—same as the pet food, the pet section. That is in the pet section.

Q. This would be on the West Coast and——

A. Out of my home in California.

Q. Now, is your answer also the same, that you did this alone, without assistance from anyone else?

A. Oh, yes—all the answers are the same.

Q. Now, any other non-food items that you have been working with since January 1, 1968?

A. I haven't been working with any of these food products since January 1, 1968. I have merely been doing some research, reading, studying.

Q. Surveys around——

A. And talking to the trade.

Q. Sir, would you explain what you have done in connection with the beef jerky market, beef jerky products, since January 1, 1968.

A. I don't recall doing anything since January 1, 1968.

Q. Well, have you made any studies or surveys or interviews, or did you just completely drop your interest in beef jerky since January 1, 1968?

A. No, as a matter of fact we had activated it again.

Q. When was it activated again, sir?

A. In my mind?

Q. Approximately when, sir?

A. Sometime in the past year or two, as a premium product.

Q. Now, what kind of surveys or observations or interviews, or whatever, have you been engaged in in connection with this?

A. Similar to the previous ones that I have made.

Q. Would this include, since January 1, the studies which you described in connection with Penthouse Foods, in the East Coast, West Coast, Southeast, and——

A. These studies I've described have been going on over a period of twenty years.

Q. What have you done specifically since you reactivated the beef jerky project?

A. Reactivated it in my mind, as a matter of active interest. When I use the word "activate," I do not mean actively marketing, I mean activating the interest in the potential.

Q. Yes, sir. Sir, you testified a few moments ago that you had recently set up a corporation structuring things for the future. Could you tell us approximately when this corporation was set up?

A. Sometime in the summer.

Q. Summer of 1972?

A. (The witness nodded affirmatively.)

Q. Could you tell the name of that corporation, sir?

A. Alden Enterprises.

Q. Is it Alden Enterprises, Incorporated?

A. Yes.

Q. Is that a Colorado corporation?

A. Yes.

Q. Could you state very briefly the nature of Alden Enterprises' business.

A. We haven't decided quite.

Q. Are you a part owner of Alden Enterprises?

A. Stock hasn't been issued yet.

Q. Has the corporation been formally formed?

A. Yes.

Q. Are you an officer or director of that corporation?

A. I am one of the incorporators.

Q. Are you also one of the original officers or directors of the corporation?

A. I intend to be.

Q. Does the corporation have any officers or directors at all today?

A. No.

Q. Who will make the decisions on what the corporation will do if it is without officers or directors?

A. The three incorporators.

Q. Who are they, sir?

A. Myself, Mrs. Alden, and Mr. Hunt.

Q. James Hunt?

A. That is correct.

Q. Is that the same Mr. James Hunt who is connected with your soft drink interest?

A. He is the sales manager of Royal Crown Bottling Company of Denver.

Q. Now, is Alden Enterprises, Incorporated, intended to have some function in connection with the food manufacture or distribution business?

A. Possibly.

Q. Do the corporate papers which have been filed with the appropriate state officials indicate what the business of Alden Enterprises, Incorporated, is to be?

A. I believe so.

Q. Do you recall, to the best of your knowledge, what they state the business of Alden Enterprises is going to be?

A. In the broad sense, the production, marketing, promotion, advertising of package goods.

Q. Any particular kinds of package goods, sir?

A. Well, it might be Mexican foods, it might be soft drinks, it might be cereal. It is a project that's just being postured. They are some things that I have wanted to do.

Q. What is the address of that corporation, sir?

A. At the moment it has a temporary address. I believe it is Post Office Box 185.

Q. That is Post Office Box 185 here in Denver?

A. I believe so.

Q. Now, is it the exclusive user of Post Office Box 185, or is that—

A. No, that is a box that I have had for my mail since I have been in town.

Q. Is that box also used for your other corporate ventures, sir?

A. Well, there is no correspondence on anything else.

Q. I'm sorry, I don't quite understand your answer.

A. I didn't understand your question. My other corporate ventures?

Q. Well, is it used in connection with your soft drink business?

A. Well, there has been an occasion—whenever there is an occasion to use a box. There was a promotion the early part of this year in which a box number was needed, so it was readily made available. It had already been paid for. We use that for promotional matter.

Q. Are there any people connected with Alden Enterprises, Incorporated, in any way, in any way whatsoever, by way of lending money, by way of consulting capacity or any function whatsoever, other than you and Mrs. Alden and Mr. Hunt?
A. No.
Q. Do our corporate papers which have been filed with the appropriate officials in Colorado, which I assume they have been, indicate the paid-in capital for Alden Enterprises, Incorporated?
A. I don't recall.
Q. Is there any paid-in capital into Alden Enterprises, Incorporated?
A. There will be.
Q. There is none as of today?
A. No, a bank account hasn't been opened up yet.
Q. Was any money paid into the corporation for the purpose of forming it as a corporation?
A. Whatever was required.
Q. Do you know where that money is today?
A. That the corporation has?
Q. Yes, sir.
A. No. What was required was the filing fee, which was paid.
Q. But the corporation funds are not kept in a separate bank account?
A. The corporation funds? The bank account hasn't been opened yet. The company is in the process of being formed.
Q. Have you discussed with anyone other than Mrs. Alden and Mr. Hunt the possibility of obtaining financing for use in connection with Alden Enterprises, Incorporated?
A. No.
Q. Does Alden Enterprises, Incorporated, have any office facilities other than your own office in the soft drink plant?
A. We are a company that hasn't been activated yet. We have just got corporation papers, and we have some unfinished business getting it finalized. So there are no offices.
Q. What is the unfinished business, sir?
A. Structuring, capitalization, whatever programing we intend doing.
Q. Who is in charge of the structuring aspect of the unfinished business for this corporation?
A. I, when I have the time.
Q. Who would be in charge of the capitalization?
A. I haven't developed that thinking yet.
Q. Have you had any embryonic thinking in connection wtih capitalization of this corporation?
A. Oh, soul-searching within myself.
Q. Have you discussed it wtih anyone at all?
A. No.
Q. Even though you may not have discussed captialization of Alden Enterprises by name with anyone, have you discussed possible capitalization of this corporation either before or after its formation, or before or after its being given a name, with anyone, sir?
A. With outside interests? No.
Q. Well, I don't know what you mean by outside interests. With anyone besides yourself?
A. Well, I naturally talk to my wife about things.
Q. Yes, sir. Anyone else?
A. That's it.
Q. Are there any other corporations which you have formed recently, sir, say since January 1, 1968?
A. No other corporations, no.
Q. Any other partnerships?
A. No partnerships.
Q. Any other businesses which may not be incorporated, but are operated as a business?
A. You mean having a financial interest in them?
Q. No, sir, connected in any way whatsoever.
A. Having a financial interest in them?
Q. No, sir, connected in any way whatsoever, as consultant, as employee, as an officer, as a director, in any connection whatsoever, since January 1, 1968.
A. Well, I put some money into one little operation.

Q. What is the name of that, sir?
A. General Beverage Company.
Q. Now, when you say "put some money" into it, was that in the form of purchase of stock?
A. At the moment it is a loan.
Q. Let me make sure I have the correct name. Is it General Beverage Company or Corporation, sir?
A. Company.
Q. And do you know the address of that company, sir?
A. I think it's 1094 West 43rd.
Q. Is it located in its own building or in someone else's building?
A. Well, again, that operation is in an early formative stage of structuring. The company's concept is national distributor of national brand soft drinks.
Q. Sir, back to my question: specifically, is that company which you said was at 1094 West 43rd Avenue your own building or somebody else's building?
A. We don't own the building.
Q. Now, does anybody own the building besides General Beverage Company?
A. Well, it's used as a mobile fleet repair area.
Q. For whom, sir?
A. Royal Crown Bottling Company.
Q. Does Royal Crown Bottling Company pay the rent on that building, sir?
A. No.
Q. Does Royal Crown Bottling Company have the lease on that building, sir?
A. No.
Q. Does you know who owns the building?
A. Royal Crown Bottling Company.
Q. Does General Beverage Company pay the rent to Royal Crown Bottling Company?
A. No, not as yet.
Q. Would you describe very briefly the building? Is it a large building, small building, multi-floor or single-floor building?
A. One-story building with complete equipment to take care of trucks, and I also store vending machines over there for repair.
Q. Is this building located near the bottling plant for Royal Crown Bottling Company?
A. Would you restate that?
Q. Is it located near the bottling plant for Royal Crown Bottling Company?
A. Is it located near the Royal Crown Bottling Company production plant and warehouse and so forth?
Q. Yes.
A. Yes.
Q. Is it across the street?
A. Yes.
Q. Do you know approximately how many square feet are in this building?
A. No, I don't.
Q. Would you describe it as being larger or smaller than a football field?
A. It might have in the area of five to 7,000 square feet.
Q. Now, would you describe in detail what it is in that building that relates to General Beverage Company?
A. It's an accommodation for whatever the business might be involved.
Q. I think maybe you misunderstood my question. I'm not asking you why it's there. I'm asking you physically what is there. If I go into the building and you point out to me what relates to General Beverage, what would you show me? Is it people? Is it equipment? Is it packaged goods? Is it vehicles?
A. That is General Beverage?
Q. Yes, sir.
A. I couldn't put my finger on anything too specific, except there may be a desk there.
Q. I am trying to expedite this as much as possible. Are there any desks that are occupied or used by General Beverage Company?
A. There is a desk that is available there.
Q. How many desks are available there for them?
A. Only one desk.
Q. Are there any items of merchandise there which belong to General Beverage Company?
A. No.
Q. Are there any vehicles there which belong to General Beverage Company?
A. No.

Q. Are there any people there who work for General Beverage Company?
A. No.
Q. Who owns General Beverage Company?
A. Well, I have set the thing up. At what time it becomes incorporated and become the owners I would say would be premature to say anything now.
Q. Let me get this clarified. It is not yet a corporation?
A. No.
Q. And you stated that you had lent General Beverage Company some money?
A. Yes.
Q. Do you recall on what date you first loaned the company money?
A. No.
Q. Do you recall approximately?
A. No.
Q. Is it within the last month?
A. Possibly within the last 60 or 90 days.
Q. Now, would this possible date within the last 60 to 90 days be the first time that you loaned money to General Beverage Company?
A. I believe so.
Q. Did General Beverage Company exist prior to that time?
A. Yes. General Beverage has existed since approximately the first of the year.
Q. The first of 1972?
A. Yes, sir.
Q. Is anybody connected with that company besides you in any way?
A. Well, I don't know what your word "connected" means. You mean an officer, a partner?
Q. Yes, sir. Since I don't know exactly what it is, it's very difficult for me to give you much guidance since you are involved with it, and I think we can speed the deposition along if you would explain to me exactly——
A. Well, I'm trying to explain if you will ask me what you want me to tell you.
Q. Well, let's take it step by step. How did it come about that General Beverage Company was formed?
A. It was a concept that was developed to market national soft drinks, all brands in the national marketplace, because of the need indicated by food chains around the country.
Q. Who all was involved in this concept?
A. I can't answer that question. That's a very broad question.
Q. Name as many people who are most closely connected with the company.
A. It's really a primitive structure. It has no payroll at the moment. It has not been incorporated as yet.
Q. Who is most closely connected with General Beverage Company besides yourself?
A. As an employee?
Q. In any capacity.
A. I still don't know how to answer that question.
Q. Does Mr. Hunt have anything to do with General Beverage Company?
A. Mr. Hunt has done some work, very minimal. He has been taking care of any of the shipments that are being put into the trucks.
Q. If I were to write a letter to General Beverage Company at this address you have given me, who would open it?
A. A good question. I presume I would. If I were out of town I don't know who would open it. Probably no one would.
Q. Does General Beverage Company have stationery with its letterhead?
A. Yes.
Q. Do you write letters on this stationery?
A. I have written one or two.
Q. Do you know of anybody else who has written letters on this stationery?
A. No.
Q. Does General Beverage Company have a bank account?
A. Yes.
Q. In its own name?
A. Yes.
Q. What bank?
A. Colorado National Bank.
Q. Who was authorized to sign checks on that bank account?
A. Mr. Alden.
Q. Yourself?
A. Yes.

Q. Anyone else?
A. No.
Q. Does General Beverage Company owe money to anyone besides yourself?
A. Besides myself? You mean on money loaned?
Q. Yes, sir.
A. I don't think so.
Q. Are there any outstanding notes or accounts payable for General Beverage Company?
A. There may be some invoices in suspension.
Q. For items that you have not yet paid?
A. For items that have not been delivered.
Q. Has General Beverage Company done any advertising?
A. Not as yet.
Q. Has General Beverage Company or anybody representing it done any solicitation of business?
A. A broker.
Q. Do you know the broker's name?
A. Of course.
Q. What is his name?
A. H & M Sales Company.
Q. Do you know the address of that company, sir?
A. I don't remember the detailed address. I know the town.
Q. Perhaps that would help us.
A. That's in Monterey Park, California. The address is on Avondale but I don't know the digits.
Q. How many people work for H & M Sales, to the best of your knowledge?
A. Well, to the best of my knowledge it would be in terms of bodies I have seen, possibly four or five.
Q. Would you give us the names to the extent you know them?
A. Well, I don't know anyone but the two principals.
Q. Who are they?
A. Mr. Tom Heckencamp.
Q. Who is the other principal?
A. Mr. McFarland.
Q. Do you know Mr. McFarland's first name?
A. Don.
Q. Do you know how long H & M Sales has been in existence?
A. I do not.
Q. Do you know if it has been in existence prior to January 1, '68?
A. I do not.
Q. When did you first become in contact with H & M Sales Company?
A. Towards the end of 1971.
Q. Prior to that time, did you ever know Mr. Tom Heckencamp?
A. Prior to the time that he was appointed as the broker, is that your question? Prior to what time?
Q. When was he appointed as broker, sir?
A. I believe it was December, 1971.
Q. This was a broker for whom, sir?
A. Broker for General Beverage Company.
Q. Was he appointed by way of a letter from you to him appointing him as your broker?
A. It was made on a telephone call I received. Subsequently there might have been an informal note confirming the rate of commission and the items.
Q. Is he a broker or does he represent in any capacity any of the other ventures in which you are connected?
A. That's a sole relationship.
Q. Do you recall specifically the items for which he is a broker for General Beverage Company?
A. No. I met some of his principals. I recall a detergent, an Italian sausage maker. I'm not sure but I think he is handling some products for one of the major meat packers.
Q. I think you misunderstood any question. I want to know the specific items for which he is a broker on behalf of General Beverage Company.
A. He was appointed to handle Buffalo Bill Sarsaparilla, Baron's Apple Beer.
Q. Any other products?
A. And other new products that have been developed, including a birch beer, a ginger beer. And that was then amended to where he would also work on any

national brands that General Beverage would have available in the entire soft-drink field, which included colas, flavors, diet drinks.

Q. Would that have also included the Royal Crown products which Royal Crown Bottling Company is licensed in connection with?

A. Would that include the licensed trademark products Royal Crown and Diet-Rite?

Q. Yes, sir.

A. That is on the national brands in America that was in the group of colas, Pepsi Cola, Coca Cola, Dr. Pepper, Fresca, Tab, Samba.

Q. Prior to your appointing Mr. Heckencamp and Mr. McFarland as your broker for these products, had you previously heard of or known or met or in any way corresponded with Mr. Heckencamp?

A. Prior to appointing him? Well, obviously, I couldn't have appointed him without knowing him.

Q. Why don't you explain the first contact you had with Mr. Heckencamp.

A. The first contact I had, as I recall, was a phone call in the late fall of '71 asking me if we would be interested in a broker in Los Angeles. He had heard that we were planning to set up brokers throughout the country.

Q. Now, by "we," whom are you referring to in that sentence?

A. The editorial we, Mr. Alden.

Q. He called you at your home or at your office?

A. He called at my office. He called at the Royal Crown Bottling office. He didn't know where else to contact me.

Q. Do you recall whether he told you how he heard of your intentions to set up brokers across the country?

A. Somebody must have mentioned it to him.

Q. Did he tell you who mentioned it to him?

A. As I recall, he was playing golf with somebody in the food field.

Q. Do you recall where he was playing golf?

A. No.

Q. Do you recall whom he was playing golf with?

A. I can only identify it as somebody in the food field.

Q. Could you be a little more specific, please, sir?

A. I couldn't, because he said he had been playing golf with somebody and heard that we were interested in developing sales on these specialty items and he would be interested in handling those items if we didn't have a broker.

Q. Now, did he also mention the national brands of soft drinks at the same time?

A. Not at first, but after we furthered our thinking, he said, "What about the national brands?" And I said, "Well, when the product is available, if you would like to handle them." I asked him what national brands, and he ran down a list of about 15 brand names.

Q. Now, when did this conversation occur relating to the national brands, sir?

A. Sometime at the end of 1971.

Q. Now, the first phone conversation you said was in the fall of 1971. And was there absolutely no mention of national brands during that first conversation?

A. Not that I recall.

Q. When did you first meet?

A. That may have been in terms of cost of delivery of product in less than truckloads and there might have been some discussion about putting out the trucks.

Q. Did Mr. Heckencamp explain to you in that first telephone conversation any experience he had in connection with distribution of soft drink products?

A. No.

Q. Did he tell you that he was involved in it in any way?

A. No.

Q. Had you heard of him in any way before that time?

A. No.

Q. A call out of the blue?

A. Well, I don't know whether it was out of the blue or off a golf course, with a highball, but I told you when he called me he said he had played golf with somebody who told him about these products, and wanted to know if we wanted a broker.

Q. Prior to that time, had you ever heard or talked to or communicated in any way with Mr. Don McFarland?

A. I didn't even know who Mr. McFarland was. I know the name of the company was H & M Sales, and Heckencamp later explained the "M" was McFarland.

Q. Did you appoint H & M Sales as a broker on the first telephone call, or was it at some subsequent date, sir?

A. It was in a subsequent period of a couple of weeks.

Q. During that couple of weeks period, did you and Mr. Heckencamp meet in person?

A. I'd have to check my calendar when we first met.

Q. But at some point in time, you did meet Mr. Heckencamp?

A. Yes.

Q. At any point in time did Mr. Heckencamp explain any activity in which he was involved in connection with soft drinks?

A. Would you restate that.

Q. At any time, did Mr. Heckencamp explain any involvement of his company or him as an individual, in connection with soft drinks?

A. What period of time are we talking about, when I first met him up to date?

Q. Well, when was the first time he told you about his involvement in soft drinks, sir?

A. Might have been on a trip, when he flew out here.

Q. Do you recall approximately when that was?

A. I'd have to check my calendar.

Q. Was it within the last month?

A. No, it was in the early stages, after our telephone conversation.

Q. All right, sir. Would you say it would be within a month of the telephone conversation?

A. I would say so.

Q. So would you put it in, say, December of '71 or January of '72.

A. In that area, between—end of November, through December.

Q. What did Mr. Heckencamp tell you about his soft drink experience?

A. Well, that wasn't our main conversation. Our main conversation was sales development of these products we had, and his mentioning of soft drinks was incidental to this discussion.

He did say that he felt that the chains very definitely had a great need for soft drinks on a proper basis of purchase and distribution, and that he had had some involvement at one time with some bottler of a brand.

Q. Did he say what brand, sir?

A. Oh, yes, Coca-Cola.

Q. Did he say which bottler?

A. Yes.

Q. Which one, sir?

A. Coca-Cola Bottling Company of Taft.

Q. That is Taft, California, is that correct, sir?

A. That is correct.

Q. Did he say he had any involvement with any other bottlers or any other national brands of soft drink?

A. Well, I think—at that particular time? I don't think so.

Q. At any other meeting has he mentioned his involvement, relationship, or sales business in connection with any other brands?

A. Well, from time to time he has talked about visits he's made to various chain stores or bottlers who are interested in a program to sell through a broker.

Q. Now, did he handle soft drink products which he obtained from the Taft Coca-Cola bottler?

A. That would be hearsay. I don't know what he actually did.

Q. Sir, I understand it might have been hearsay, but—

A. Well, I wasn't paying too much attention to what he was doing with Coca-Cola. I was interested in sales development of my products.

Q. Sir, I am just asking you for your very best recollection, and you just explain to me what you recall he told you he did in connection with Taft Cola- Cola.

A. When he was visiting here?

Q. We will start with that.

A. I subsequently found out evertyhing he did.

Q. How did you subsequently find it out?

A. Well, I read a speech that he made in front of Senator Hart's Antitrust and Monopoly Committee.

Q. Any other sources, sir?

A. Of his involvement with Coca-Cola?

Q. Yes, sir.
A. Well, I met Mr. Foster in Washington.
Q. Would you explain for the record Mr. Foster's first name and his position in this.
A. I don't recall his first name. I don't know if it's Foster Pope or Pope Foster, but anyway, he is the bottler of Coca-Cola in Taft.
Q. He is the Taft Coke bottler. Had you ever met Mr. Pope Foster before your trip to Washington?
A. No.
Q. Sir, back to Mr. Heckencamp's first visit with you, was that here in Denver?
A. As I recall, he flew out here to Denver.
Q. You said that he did make some mention of his involvement with the Taft Coca-Cola bottler. As best you can recollect, explain for the record the substance of Mr. Heckencamp's comments in that connection.
A. Well, the substance was that he had started in selling Coca-Cola in the marketplace there, and there had been some arrangement between the Coca-Cola bottler in Los Angeles and the Coca-Cola bottler in Taft, and the Coca-Cola bottler in Los Angeles reneged on him, and he was moving product into Taft. And, to stay alive, Mr. Pope went ahead and appointed a broker and decided to sell products in Los Angeles. That's in substance.
Q. Now, when did you next meet with Mr. Heckencamp, sir?
A. I can't recall. I met with him two or three times subsequently to that.
Q. Is your testimony that since approximately December of '71, when you first got the phone call, and to the present date, you have only met him in person?
A. I don't know if my testimony was in December—I said it was in that time area.
Q. Approximately.
A. He came out either in November or December, I said, so obviously I had the phone call before he came out.
Q. Since the phone call in the fall of '71.
A. About three or four times.
Q. Three or four times that you have seen him face-to-face?
A. Yes.
Q. Now, did any of those meetings occur at Monterey Park, California?
A. I think the meetings were mostly in my hotel, although he has an office in Monterey Park and we did go to lunch twice, and he did drop by his office to pick up mail and telephone calls. But we didn't have any meetings—
Q. Now, I am a little bit confused. Which hotel are you talking about that these meetings occurred in, sir?
A. The hotel that I may have stayed at.
Q. In California?
A. Right.
Q. What city, sir?
A. Los Angeles.
Q. Sir, would you state again for the record the date you acquired Royal Crown Bottling Company.
A. In December, 1968.
Q. Where was your home at that time, sir?
A. California.
Q. What city, sir?
A. Atherton.
Q. Did you have an apartment or a house in that city, sir?
A. I have had a home there for many years.
Q. Do you still own the home there, sir?
A. Yes.
Q. Do you presently have a home in Denver or the Denver area?
A. I live here.
Q. Do you have a hotel room or a home?
A. A house.
Q. How long have you been in that house, sir?
A. A little over a year.
Q. Approximately what date, sir?
A. September, 1971.
Q. Prior to that time, did you have an apartment or a house in the Denver area?
A. I had a house leased on High Street.

Q. I'm sorry—you were the tenant or you lived in the house on High Street?
A. I leased a house on High Street prior to the one I am in now.
Q. In which you lived?
A. Yes.
Q. When did you first lease the house on High Street, sir?
A. I believe in September, 1970.
Q. Prior to your lease of the house on High Street, did you have an apartment or a home of any sort in Denver?
A. Yes, I leased another property.
Q. Where was that, sir?
A. On Franklin—Cherry Hills.
Q. That is in Denver, sir?
A. I believe Cherry Hills is outside of Denver. I think it is part of Englewood.
Q. When did you lease the Cherry Hills house, sir?
A. Well, the lease on that house ended when I moved to High Street, and I had the house there for a period of approximately a year.
Q. Prior to the house in Cherry Hills, did you have a house or an apartment of any sort in the Denver area?
A. I had an apartment by myself in town. My family was in California.
Q. Where was this apartment, sir?
A. On 16th and Williams.
Q. When did you first take that apartment, sir?
A. When I came to town, after the Christmas holidays—I believe it was January 2nd.
Q. What year was that, sir?
A. 1969.
Q. Sir, during the period of December 1, 1968 up to the present, has your Atherton, California home been closed up or is it open and functioning, lived in?
A. Well, it was open until about a year and a half ago. The family spent the summers there.
Q. Did you spend some time there too, sir?
A. Yes.
Q. Sir, since December 1, 1968, have you either had an apartment or a house, by way of ownership or lease or otherwise, other than the houses that you have just described, in any city?
A. No.
Q. Sir, other than the companies that you have described this morning, are you a shareholder in any other company?
A. Oh, I think, like all Americans, we have a few shares of this and a few of that, some in my wife's ownership and some in the children.
Q. Well, does your family have any ownership in any company connected with food manufacture or distribution?
A. No active companies, no.
Q. Any inactive companies, other than Penthouse Foods?
A. Well, if a company isn't active, there is no company.
Q. Have you loaned money or provided funds for any company other than General Beverage Company?
A. Yes, I made a loan to Royal Crown Cola Company—Bottling Company, here a few months ago, about a month ago.
Q. Is that the first loan you have made to that company, sir?
A. First time it was necessary.
Q. Do you recall the amount of that loan, sir?
A. Ten thousand dollars.
Q. How much money have you contributed or loaned in connection with the General Beverage Company, sir?
A. Would you restate that.
Q. Have you placed any funds up for use by the General Beverage Company? Have you loaned them money or provided them money?
A. You asked me that earlier, and I answered.
Q. I don't recall your answer, sir. Could you repeat it again.
A. Would you read the answer, please.
Q. Sir, we are trying to do this as quickly as possible.
A. I know, but you asked me the question. I did tell you that I made a loan.
Q. Approximately when was that loan, sir?
A. That was made a few months ago.
Q. Do you recall approximately when?
A. A few months ago, in the sum of six thousand dollars.

Q. Has anybody else loaned General Beverage Company money?
A. No.
Q. Sir, have you ever heard of an organization called the Alden Company?
A. The Alden Company?
Q. Yes, sir.
A. Yes.
Q. Would you describe briefly for the record what the Alden Company is.
A. Well, the Alden Company originally was the advertising agency that merged into B.B.D.O.
Q. Well, is it still in existence?
A. I have set it up a couple of years ago in order to get advertising recognition, on advertising expenditures made by any companies in which I am interested.
Q. Would it be fair to state that the Alden Company trades as an advertising agency?
A. It is recognized as an advertising agency.
Q. Is it a corporation?
A. No, sole ownership, proprietorship.
Q. Are you the sole owner of that advertising agency?
A. Yes. That is being put into Alden Enterprises.
Q. Is anyone working with the Alden Company other than yourself, sir?
A. No, I create all the advertising and handle media contacts.
Q. No one assists you in these endeavors for the Alden Company?
A. From time to time, if a free-lance party is necessary, an artist, an outside tradesman—no payroll.
Q. Is the Alden Company advertising agency restricted in scope to advertising related to Royal Crown products, or does it have a broader base?
A. Oh, it has a much broader base.
Q. Is it restricted in scope to handling accounts relating to soft drinks, or does it have a broader base?
A. Broader base.
Q. Is it restricted to handling accounts relating to food products, or does it have a broader base?
A. It is not restricted.
Q. So would it be fair to state, sir, that it has a wide variety of products and accounts?
A. It is fair to state that it has handled various types of accounts, and if someone came along with a tremendous budget and justified the economics of it, it would be in a position where we'd consider taking on an advertising account. But at the moment it is primarily servicing the soft drinks.
Q. Sir, would you explain your connection with Royal Crown Bottling Company, the plantiff in this action.
A. I am the President.
Q. Do you hold any other other office?
A. Treasurer.
Q. Treasurer, sir?
A. (The witness nodded affirmatively.)
Q. Any other, sir?
A. No.
Q. Are there any other officers of Royal Crown Bottling Company?
A. There is a Vice President and a Secretary.
Q. Who is the Vice President, sir?
A. Mr. Henry Roath.
Q. Is he a lawyer here in Denver, sir?
A. Yes.
Q. Who is the Secretary?
A. Mr. Robert Showalter.
Q. Is he Mr. Roath's law partner, sir?
A. They are in the same law firm.
Q. Any other officers, sir?
A. No.
Q. Could you tell us who is on the Board of Directors of Royal Crown Bottling Company?
A. Those are the directors.
Q. The directors are yourself—
A. I beg your pardon. Now, we have a Mr. Miller.
Q. What is his first name, sir?

A. James.
Q. What is his address, sir?
A. 14 Wall Street.
Q. Do you know what business he is in at 14 Wall Street, sir?
A. Well, he was the executive officer of an underwriting brokerage firm.
Q. Do you recall the name, sir?
A. I don't recall the present name. There have been several mergers.
Q. Would it by Blyth and Company, at one point in time?
A. That would have been the name, and now it's Eastman, Dillon and something—I don't know the name now. There have been several mergers.
Q. Other than yourself, Mr. Roath, Mr. Showalter and Mr. Miller, are there any directors of Royal Crown Bottling Company?
A. Did you mention Mr. Devlin?
Q. No, sir, I did not.
A. I believe that Mr. Devlin and Mr. Miller are the directors.
Q. Devlin or Debben?
A. Devlin, D-e-v-l-i-n.
Q. Now, we are talking about directors of Royal Crown Bottling Company? Is that your understanding of my question, sir?
A. As I recall, those two gentlemen are the directors. If they are not, it's the two—it's the officers. The corporate records that are on file speak for themselves.
Q. Sir, would you state for the record approximately how many stockholders there are of Royal Crown Bottling Company.
A. One.
Q. Would you identify that stockholder, please?
A. Interstate Beverage Company.
Q. Are you an officer or director of Interstate Beverage Company?
A. Yes, sir.
Q. What is your position, sir?
A. President and treasurer.
Q. Do you know who the other officers are?
A. They're on record in our corporation papers.
Q. Do you know if Mr. Roath is the vice-president?
A. Of Interstate Beverage?
Q. Yes, sir.
A. I believe so.
Q. Do you know if Mr. Showalter is the secretary?
A. I believe so.
Q. Do you know who the directors of Interstate Beverage Company are?
A. Yes. Myself, Mr. Devlin and Mr. Geiger.
Q. Would you identify for the record who Mr. Geiger is?
A. Mr. Geiger is a gentleman in the underwriting brokerage business in the investment of funds in New York.
Q. Do you know whether he is affiliated with any company or——
A. I believe he is a director of many companies, many large major companies in America.
Q. Would you state for the record the approximate number of stockholders of Interstate Beverage Company?
A. Four.
Q. Would you identify these for the record, please?
A. The four directors I mentioned.
Q. That would be yourself, Mr. Miller, Mr. Devlin and Mr. Geiger?
A. Right.
Q. And Mr. Roath and Mr. Showalter are not stockholders of Interstate Beverage Company?
A. That's correct.
Q. Do you know approximately when Interstate Beverage Company was formed?
A. 1968.
Q. Do you recall whether it was the beginning or end of the year?
A. The end of the year.
Q. Was it formed before or after you became interested in becoming Royal Crown's licensee in the Denver area?
A. Simultaneously.
Q. Does Interstate Beverage Company have any assets other than the stock of Royal Crown Bottling Company?
A. It has some marketing fees, accounts receivable.

Q. Anything else?

A. No.

Q. Is Interstate Beverage Company an operating company or is it solely a holding company?

A. It's intended as a marketing operation nationally in new-product development and it's intended to expand its operation.

Q. Did you say "and new product development," sir?

A. In the packaged goods field.

Q. Would you state for the record where the office of Royal Crown Bottling Co. are located?

A. 4300 Jason.

Q. Does the company own the building?

A. No. It's leased.

Q. Does it have any other facilities, real estate facilities, buildings, offices, plants?

A. Yes. The building across the street is owned by Royal Crown Bottling Company, as I testified earlier.

Q. Any others, sir?

A. Any other buildings?

Q. Yes, sir.

A. No.

Q. Sir, the building across the street at 1094 West 43rd Avenue which you have earlier testified about was occupied both by Royal Crown Bottling Co. and General Beverage Company. Do any other organizations, businesses or corporations or partnerships make any use of that building besides your General Beverage Company and Royal Crown Bottling Co.?

A. Not presently.

Q. Have any in the past?

A. No.

Q. Is there some plan for somebody else to make use of some part or all of that building in the future?

A. There is always a possibility.

Q. Has that possibility been considered by you?

A. Not actively.

Q. But has it been considered on some other basis?

A. Not really.

Q. Has it been considered at all?

A. There was some consideration of possibly converting that space more efficiently to maye a food-processing operation.

Q. On behalf of which company, sir?

A. Well, in terms of—no company particularly. In terms of product potentials.

Q. When was this consideration?

A. It may have been even four years ago.

Q. Sir, have you considered using the facility for Alden Enterprise, Incorporated?

A. Not actively.

Q. Sir, I don't mean to be critical of your answers, but I am trying to——

A. I don't know how to answer the question. I suppose I should say no, because nothing has been done about it.

Q. Not has something been done, but had you considered——

A. I had lots of thoughts go through my mind, but that doesn't mean a consideration.

Q. Well, have you had any thoughts about moving that building for Alden Enterprises, Incorporated?

A. I can sum it up best by saying we have had thoughts how we can best use the building more efficiently to be profit productive rather than a cost. Right now it's just a cost.

Q. Sir, do any companies, partnerships, corporations or other business organizations make use in any way of 4300 Jason Street other than Royal Crown Bottling Co.?

A. No.

Q. Where are the offices for Interstate Beverage Company?

A. The same address as Royal Crown Bottling Company.

Q. Do you amend your prior answer to that extent?

A. I beg your pardon?

Q. Would you amend your prior answer to that extent that perhaps you didn't understand my question? I asked you if any corporations, businesses, partnerships or——

A. At West 43rd Street you asked, did you not? I thought you were referring to the one-story building across the street.

Q. Perhaps it would simplify things if we just started over again on that. I'm talking about the building which you described at 4300 Jason Street, which I believe you said——

A. I thought you said the one on 43rd. Are you talking about the small building or the big one?

Q. I don't know which one is the small one and which one is the big one.

A. 4300 Jason is the large building. The small building is the one on West 43rd, and I thought you asked me about 43rd Avenue.

Q. I'm talking about the big building.

A. And you're talking about 4300 Jason.

Q. Yes, sir.

A. The question is?

Q. Do any companies, partnerships or business enterprises of any sort make use of that building in any way whatsoever other than Royal Crown Bottling Company?

A. Well, Interstate Beverage has a base address of 4300 Jason as its operation point. And the Alden Company on advertising is 4300.

Q. Any others, sir?

A. Those are the only companies that use that address and building.

Q. Sir, are Mr. Roath and Mr. Showalter active in the business operations of Royal Crown Bottling Company?

A. Active in what capacity?

Q. In any capacity.

A. Well, they are retained as legal counsel on legal matters.

Q. Are they involved in the business in any other way?

A. No.

Q. Do they have offices at the building at 4300 Jason?

A. No.

Q. Do they visit that building?

A. They do. They have.

Q. Approximately with what frequency?

A. I can't recall that.

Q. Would you say it's more than once or twice a year?

A. Possibly once or twice a year.

Q. Does Mr. James Miller have any active participation in the day-to-day operations of Royal Crown Bottling Co.?

A. No active participation on a daily basis.

Q. Would you describe briefly his participation in the operations of Royal Crown Bottling Co.?

A. As a director.

Q. How often did the board of directors meet?

A. Once or twice a year.

Q. Do you recall when the last time was they met?

A. The official regular annual directors' meeting usually occurs around November, and at other times we have infrequent meetings, informal.

Q. When was the last meeting that you had, sir, formal board of directors meeting?

A. November, 1971.

Q. Where was that held?

A. In New York.

Q. At whose offices, sir?

A. 14 Wall Street.

Q. Do you recall when the immediate preceding formal board of directors meeting for Royal Crown Bottling Co. was held?

A. Would you restate that?

Q. When was the meeting just prior to that, formal board of directors meeting of Royal Crown Bottling Co.?

A. Prior to that one?

Q. Yes.

A. In November, 1970, either October or November. It was in roughly the same period of time. That was held at 14 Wall Street.

Q. Do you recall when the immediate preceding formal board of directors meeting was at Royal Crown Bottling Co.?

A. As I said, they were regularly held in the October-November period each year. So I would assume it would have been held in 1969.

Q. Was that also at 14 Wall Street, New York City?

A. Yes.

Q. Was there an organization meeting of the board of directors, sir, prior to November, 1969?

A. Yes.

Q. Where was that held?

A. In Denver.

Q. Do you recall the approximate date?

A. In the time period of December, 1968.

Q. Can you specifically recall any meetings of the board of directors, formal meetings of the board of directors, of Royal Crown Bottling Co. other than those which you have just specifically——

A. Those are the only formal directors meetings.

Q. Does Mr. Devlin have any connection with the company's operations other than in his capacity as a director?

A. No.

Q. Does Mr. Geiger have any connection with the operations of Royal Crown Bottling Co.?

A. No.

Q. None whatsoever?

A. No, other than being a director of Interstate.

Q. When do the directors of Interstate meet?

A. I thought your question was on the—they meet at the same time that Royal Crown Bottling Company directors meet.

Q. Have they held meetings?

A. In the same time frame.

Q. Same dates and same places?

A. Yes, successively.

Q. Which one usually meets first?

A. Royal Crown.

Q. Is Mr. Geiger present during those meetings?

A. Yes.

Q. Were any other people other than the directors themselves present at the meeting of Royal Crown Bottling Co.?

A. No.

Q. Sir, does Interstate Beverage Company have any employees?

A. They have no payroll.

Q. I believe you testified earlier that among the assets of Interstate Beverage Company were some marketing fees.

A. That's correct.

Q. Would you explain what you mean by that?

A. Yes. Interstate Beverage is primarily concerned in selling to warehouses and in the national marketplace. They fill and bill orders on our specialty items.

Q. Would that include soft-drink products?

A. Especially items that are soft drinks.

Q. Including Royal Crown?

A. Such as Buffalo Bill's Sarsaparilla, Mug Root Beer, the Baron's Apple Beer, Dutch Keg, Whyte's ginger beer.

Q. Any others, sir?

A. They have purchases Royal Crown Diet-Rite.

Q. From Royal Crown Bottling Co.?

A. Yes.

Q. How about Royal Crown Cola?

A. That has been an item.

Q. That Interstate Beverage Company has purchased from Royal Crown Bottling Company?

R. Yes, on memorandum paper work.

Q. On what?

A. Memorandum paper work. They have purchased and they have made the sale and billed and turned the proceeds of what was owed to Royal Crown.

Q. Who does the selling on behalf of Interstate Beverage Company?

A. I do. We have brokers out in the field.

Q. Does Mr. Hunt do any selling for Interstate Beverage Company?

A. Oh, yes.
Q. Anyone else?
A. Appointed brokers.
Q. Anyone else?
A. Myself.
Q. You said there was no payroll of Interstate Beverage Company. I want to make sure I understand the situation. Does Mr. Hunt receive any compensation from Interstate Beverage Company?
A. No.
Q. Do you receive any compensation from Interstate Beverage Company other than in your capacity as a stockholder or a director of the corporation?
A. No.
Q. Does Interstate Beverage Company have a bookkeeper?
A. No.
Q. Does Interstate Beverage Company have books of account?
A. I have records on anything necessary.
Q. Who keeps these records?
A. The comptroller.
Q. Of what, sir?
A. He's on the Royal Crown payroll.
Q. Does he also keep any necessary records for General Beverage Company?
A. Well, the accounts payable clerk keeps records on Interstate billings.
Q. Interstate Beverage Company's billings are kept track of by Royal Crown Cola?
A. If you wish to characterize it that way, the employee of Royal Crown who is on accounts receivable stays on top of the Interstate Beverage billings.
Q. Does he also stay on top of the General Beverage Company billings?
A. That's what I just—General Beverage, no.
Q. Who keeps track of those?
A. Well, I guess Mr. Heckencamp.
Q. Well, he is not keeping track of your bank account and your billings, is he?
A. No.
Q. Who keeps track of it on behalf of you?
A. I do.
Q. Are you on the payroll of General Beverage Company?
A. There is no payroll.
Q. Do you receive any compensation from them?
A. No.
Q. Does General Beverage Company pay any rent to Royal Crown Bottling Co.?
A. Not to date.
Q. Does Interstate Beverage Company pay any rent to Royal Crown Bottling Co.?
A. No.
Q. Does Interstate Beverage Company own any corporations or businesses other than Royal Crown Bottling Co.?
A. No.
Q. Are the services of your comptroller and accounts payable receivable clerks and so forth employees of Royal Crown Bottling Co.? Are these services rendered to Interstate Beverage Company charged to Interstate Beverage Company?
A. Well, there really aren't many services. They're merely billings that go out and receipts that come in.
Q. Well, let's put it another way: are there any operational services of Interstate Beverage Company which aren't performed by officers or employees of Royal Crown Bottling Co.?
A. No.
Q. Now, is Royal Crown Bottling Co. compensated in any way for rendering these services?
A. No.
Q. Are there any services in connection with the operation of General Beverage Company which are not performed by you or other employees of Royal Crown Bottling Co.?
A. No.
Q. Is Royal Crown Bottling Co. compensated in any way for these services?
A. For mine?
Q. For any of the services.
A. I just said there were no services rendered by anybody. You asked me if there were any services rendered by anybody, and I said no.

Q. You are misconstruing my question, and I caution you to listen very carefully because it has occurred several times. I asked you whether any services performed in connection with the operation of General Beverage Co., any of these services, are performed by anyone other than officers or employees of Royal Crown Bottling Co.

A. That is what I thought you said, and I said no, outside of what I told you about Heckencamp.

Q. All right, sir. Now, does Royal Crown Bottling Company receive any compensation from General Beverage Company?

A. Does Royal Crown Denver receive any compensation? No.

Q. Sir, does General Beverage Company have a telephone listing in the phone book in Denver?

A. Not to this date.

Q. Does it have any telephone facilities other than those that belong to Royal Crown Bottling Company?

A. It has no occasion to need any. That is why no phone installations have been made. Until a permanent address is set up, there is no sense in getting a phone.

Q. Does Interstate Beverage Company have any telephone facilities other than those belonging to Royal Crown Bottling Company?

A. No.

Q. Does it have a telephone number listed in Denver?

A. I believe so.

Q. Is the number the same as for Royal Crown Bottling Company?

A. Yes.

Q. Is the mailing address of Interstate Beverage Company—say I wanted to write them a letter—the same as Royal Crown Bottling Company?

A. 4300 Jason.

Q. Sir, could you explain in some fashion that we can understand why your operations appear to be involved at least with four different companies? And I am thinking in particular of Interstate Beverage Company, Royal Crown Bottling Company, and General Beverage Company. Why do you use these three companies? How do you decide what part of your operation is covered by one or should be handled by one, as opposed to the other?

A. Well, General Beverage was incorporated to develop a national program and, of course, it has a common interest in the activities of Royal Crown of Denver. Now, which other companies did you inquire about, the General Beverage?

Mr. Wallace. Well, excuse me—would you read back just the first part of the witness' answer.

(Answer read.)

A. (Continued) It's Interstate Beverage I'm speaking of. Did I say General? Interstate.

Q. (By Mr. Wallace) Well, we are confused over this too, Mr. Alden.

A. That was the company that was started the same time that Royal Crown was purchased.

Q. Yes, sir. But how do you distinguish between the functions of Interstate Beverage Company and Royal Crown Bottling Company?

A. Royal Crown Bottling Company has been concerned primarily with the Royal Crown items. Interstate has been concerned with the items such as our Mug Root Beer.

Q. Sir, you referred to this Mug Root Beer several times. Is this a product which is bottled by you or one of your enterprises?

A. Bottled here in Denver by Royal Crown Bottling Company.

Q. Now, is it bottled on behalf of Interstate Beverage Company?

A. Yes.

Q. Now, does Royal Crown Bottling Company receive compensation for this bottling function?

A. Not really.

Q. Well, sir, you have mentioned several times a Buffalo Bill soft drink? Is this bottled?

A. Sarsaparilla.

Q. Buffalo Bill sarsaparilla, I believe you said?

A. Yes. All the bottled items are bottled by Royal Crown.

Q. On behalf of Interstate Beverage Company?

A. Or General Beverage.

Q. This would include Buffalo Bill sarsaparilla, Baron's Apple Beer,——

A. The Baron's.

Q. Birch Beer?

A. Dutch Keg Birch Beer.
Q. Ginger beer?
A. Whyte's Ginger Beer.
Q. Any others, sir?
A. Others that will be marketed.
Q. But any others presently being marketed?
A. No, that is——
Q. These are all bottled on behalf of Interstate Beverage Company?
A. Or General Beverage.
Q. Or General Beverage. Are the quantities of products bearing these names, Buffalo Bill, Baron's and Whyte's and so forth, and Old Dutch, substantial?
A. What do you call substantial?
Q. Well, is it an important part of your operation?
A. It is becoming an important part.
Q. But are all of these products bottled by Royal Crown Bottling Company?
A. Yes.
Q. And they receive it, but Royal Crown Bottling Company receives no compensation whatsoever for this?
A. It receives nothing—it would be a bookkeeping adjustment, which wouldn't make any sense, back and forth.
Q. Why do you say it would just be a bookkeeping adjustment?
A. Because there is a community of interest and common interest between what is going on in Interstate and Royal Crown.
Q. And General?
A. Not and General. I said Interstate and Royal Crown.
Q. Now, how would you distinguish the community of interest, on the one hand embracing Interstate and Royal Crown Bottling Company, and then on the other hand General Beverage Company?
A. Well, General Beverage is just being postured, and it is in a very primitive stage. It's just been taken beyond the idea stage and thinking is being developed as to how it should be permanently structured.
Q. But I believe I recall from your prior testimony that it is transacting business as of this date?
A. Yes.
Q. Now, would you describe as best you can how the General Beverage Company interests differ from those of the community interest of Interstate and Royal Crown Bottling Company?
A. Well, General Beverage is just a distributor; it buys products and sells product.
Q. Now, would you say that the General Beverage Company handles Buffalo Bill sarsaparilla?
A. Yes.
Q. Does General Beverage Company handle Baron's Apple Beer?
A. Yes.
Q. Does it handle Old Dutch Birch Beer?
A. Yes.
Q. Does it handle the ginger beer?
A. Whyte's Ginger Beer, yes.
Q. Now, why aren't there compensating payments made to Royal Crown Bottling Company for the work that Royal Crown Bottling Company does in connection with General Beverage Company's distribution of these products?
A. No reason. A distributor merely buys product and pays for it.
Q. Who is handling all this paperwork, Mr. Alden?
A. The paperwork on what? The purchase?
Q. On these various products that General Beverage Company distributes.
A. General Beverage issues a purchase—an order. It gets the merchandise, it pays a check. There is not much paperwork.
Q. Who types out the order?
A. I have.
Q. Does your secretary do work in connection with the paperwork for General Beverage Company?
A. I have no secretary.
Q. You have no typist or stenographer in any of your various enterprises?
A. We have a girl who does reconciliation on driver sales and spends most of the day on that financial work. Once in a while she types a letter up. She can take shorthand.

Q. Let's get down to the heart of this, if you would. First explain to me how many employees there are for Royal Crown Bottling Company.
A. Well, the normal complement is about thirty-two, and our present group is probably around twenty some.
Q. Twenty how many, sir?
A. I can't give you the exact amount.
Q. Would you say it would be in the very low twenties or very high twenties?
A. Well, if you will be indulgent, I will add them up.
,Q. Sir, just to save time, why don't you, as you are mentally adding them up, just describe who they are, what their functions are, their names, and we will have the whole picture, and I can save you some time.
A. Well, I have the general office, with an accounts payable clerk and an accounts receivable clerk, and a young lady who does filing and basically driver salesman reconciliation on funds, sales slips.
And we have a Controller, we have a sales manager, and we are now down to five route salesmen and a supervisor who also has to run a truck. And we have a normal complement of about six people on production, a production manager and a crew of five to six, which will vary with some of the transient casual help.
We have a mechanic who maintains the mobile fleet. And then we have a night-loader crew, three of them that load the trucks at night.
Q. Can you think of any others, Mr. Alden?
A. Well, I have just been thinking of what we have, and that is what we have right now.
Q. All right, sir. Who is your accounts payable clerk?
A. Tom Ingle.
Q. Who is your accounts receivable clerk sir?
A. Mrs. Miller.
Q. Do you recall her first name, sir?
A. Norma.
Q. Now, I wasn't quiet sure, sir, but is the filing done by the same lady who does the driver reconciliation?
A. Yes.
Q. What is her name, sir?
A. Lynn Bauxman.
Q. Who is the Controller, sir?
A. Well, the acting Controller is the accountant, Mr. Buchanan.
Q. What is his first name, sir?
A. Fred.
Q. And is Mr. James Hunt the sales manager?
A. Yes.
Q. Do you recall the names of the five route salesmen sir?
A. Well, one is Rasmussen.
Q. What is his first name, sir?
A. I don't know.
Q. Do you recall any other name?
A. Gillette.
Q. Do you recall his first name?
A. I don't.
Q. Do you recall any others, sir?
A. McLean.
Q. Do you recall his first name?
A. Ray.
Q. Do you recall the names of the other two, sir?
A. Neal.
Q. That is his last name?
A. Yes.
Q. Do you know his first name, sir?
A. I don't.
Q. How about the fifth one, sir?
A. I don't recall the name.
Q. And who is the supervisor of the route salesmen?
A. Gallegos.
Q. Do you recall his first name?
A. Joe.
Q. Do you recall the name of your production manager, sir?
A. Mark Day.

Q. Mark Day?
A. Right.
Q. Do you recall the names of any of the six people on the production line?
A. None of the others.
Q. I assume that is true of the casual help that you have?
A. That—I don't even know what they look like.
Q. Do you know the name of the mechanic for your mobile fleet?
A. Bob Motley, M-o-t-l-e-y.
Q. Do you recall the names of any of the night-loader crew, or are they more or less casual?
A. The head man's name is Jose.
Q. That is his first name?
A. Yes.
Q. You don't recall his last name?
A. (The witness nodded negatively.)
Q. Can you think of any other employees, sir, either by name or title or function?
A. You mean permanent employees?
Q. As opposed to casual mechanical workers.
A. You mean that are on the payroll now?
Q. Yes, sir.
A. No.
Q. Does your accounts payable clerk, Mr. Tom Ingle, handle accounts payable for General Beverage Company?
A. (The witness nodded negatively.)
Q. Who handles the accounts payable for General Beverage Company?
A. I do.
Q. You do. Who handles the accounts receivable for General Beverage Company?
A. I do.
Q. Do you actually make the entries into the books?
A. Keep the records. There aren't that many records, at the moment.
Q. But do you make all the entries into the books of General?
A. Up to now.
Q. Would you describe briefly the types of books that exist for General Beverage Company.
A. A receipt book and a disbursement book.
Q. Are these loose-leaf accounting books, is that it?
A. No, they are very informal record-keeping.
Q. Informal record-keeping? Would they be sort of in a school type notebook, or on pieces of paper?
A. I would say, characterize it as a school type notebook.
Q. Spiral notebook?
A. Office notebook, a binder.
Q. How many of these notebooks are there now, just two?
A. On disbursements and receipts?
Q. Yes, sir.
A. No, it's just one.
Q. One book handling both disbursements and receipts?
A. Sort of based on a daily diary.
Q. Are there any books kept on behalf of General Beverage Company?
A. Not yet.
Q. Are there any files of correspondence for General Beverage Company?
A. No correspondence.
Q. Beg your pardon, sir?
A. There is no correspondence.
Q. Are there files with invoices and orders and things of that sort?
A. Yes.
Q. Where are they kept, sir?
A. My home.
Q. Why are they kept at your home, rather than at your office?
A. Because I have used my home as an office for many, many years and still do.
Q. For all of your enterprises, or just the General Beverage Company?
A. General Beverage, the Alden Company.
Q. Now, when General Beverage Company receives orders or fills orders for products, would you explain very briefly the mechanics of how these orders are filled, sir.

A. General Beverage informs the accounts payable clerk who types up invoices for Royal Crown and Interstate, and he prepares an Interstate billing. Against that billing, an order is shipped.

Q. I see. So let me make sure I understand this. An order comes in to General Beverage?

A. Right.

Q. It is referred to Tom Ingle, who is——

A. The order is not referred. The purchase is referred to him. He doesn't know anything about the order. All he takes care of is the sale of Interstate to General Beverage. General Beverage is treated like all the other customers, distributors, or anybody else.

Q. Who takes care of filling the order for General Beverage, then?

A. Interstate Beverage.

Q. Now, who at Interstate Beverage handles that?

A. Ingle.

Q. Now, who handles the processing of the products, of the papers, to make sure that the order is sent to the appropriate customer?

A. Well, a bill of lading is prepared and—I prepare it.

Q. You prepare the bill of lading?

A. Right.

Q. From whom to whom? I would like you to explain the mechanics of this, and paid for, and that is filled by the people out in the warehouse, shipping it out, and giving the bill of lading to a trucker.

A. I prepare a bill of lading which shows the merchandise that's been ordered because it is a little bit confusing.

Q. So you prepare the bill of lading and it is carried by one of your Royal Crown Bottling Company employees out to the warehouse?

A. I might personally carry it out to the——

Q. But you give it to one of the Royal Crown Bottling Company employees?

A. Yes, because it is products that are made in the plant there.

Q. Yes, it is. And they in turn put it on the truck for General Beverage Company's customer?

A. Yes. They get all their invoices on outgoing shipments. If Associated Grocers in Denver is buying some Mug Root Beer or the Baron's Apple Beer, they get the same information; they get a copy of the invoice and a bill of lading, to release merchandise.

Q. Yes, sir. I am just trying——

A. And they don't care whether it's Royal Crown or Interstate or General, or Rainbow Distributing; whatever the company is, they are instructed on what they can release.

Q. Yes, sir. And so if General Beverage got an order, say, for Royal Crown Diet-Rite, or whatever brands, including, say, Royal Crown Diet, you would write up the bill of lading after receiving this order?

A. Right.

Q. And you would give it to the man in the Royal Crown Bottling Co. warehouse?

A. Yes, and who releases products to various trucks.

Q. Now, which trucks would these be, whose trucks?

A. Well, I can't remember all the names. You're speaking specifically of General Beverage?

Q. Yes, sir.

A. Some of the trucking companies that come into town and are looking for pickup loads, and if we have anything, they take it.

Q. So, in other words, if you have an order of Diet-Rite——

A. Right.

Q. ——for, say, California, which General Beverages received, you, Mr. Alden, would fill out a bill of lading and give that to your warehouse people and you would try to find a truck in town that needs a load going back there and——

A. Or we would get a phone call from the trucker who is coming in and asking for a load.

Q. But you make the arrangements for finding a truck going back to California?

A. Right, or wherever it's going.

Q. Yes, sir, on the building at 1094 West 43rd Avenue——

A. Give or take one of the last digits.

Q. ——which, for simplification, you have explained is the small building.

A. Right, one-story building.

Q. Is there any sign on that building which would indicate what companies operate out of the building?

A. No. There is no need for it.

Q. Could you explain to the best of your ability how people hear about General Beverage Company, how they know to place orders with them?

A. As I pointed out, the company is still in a very primitive stage. It has one broker. And if they write a letter to General Beverage, the mail will find its way to me unless the post office loses it. Other than that, we have had no phone calls.

Q. You say it's a very primitive stage. Could you give us an estimate of the dollar value of soft drinks which have been handled under the name of General Beverage Co. since its formation?

A. Oh, possibly 150,000, 175,000.

Q. That would be since around January of 1972?

A. Yes.

Q. Could you tell us, of that quantity, approximately how much of that would be Royal Crown products, either Royal Crown Cola or Diet-Rite or otherwise?

A. Possibly 85 per cent, 83 per cent.

Q. 85 per cent would be the RC Cola?

A. It would be any of the Royal Crown items.

Q. Which items would that include, sir?

A. Well, that could be Royal Crown. It could be Diet-Rite. It could be Gatoraid Citrus, Gatoraid Cola, Royal Crown with a twist of lemon. Flair and Ne-Hi flavors.

Q. Now, sir, of the 85 per cent which would be Royal Crown products, would you give us an estimate of approximately how much of those products would be just Royal Crown Cola and Diet-Rite Cola?

A. I would say 95 per cent of the 85 per cent.

Q. Now, could you tell us approximately how many different customers there had been since its creation of General Beverage Co.?

A. I would say there have been orders to many of the major chains and retail co-ops.

Q. Could you identify as many of these as you can remember, please?

A. Well, just about everybody except Ralph's, Market Basket and Lucky.

Q. Well, sir, just for the benefit of people who are not as familiar with who everybody is as you might be, could you give the list in the alternative of the people who actually have ordered?

A. Well, the largest retail co-op in the market is Certified Grocers. The two major warehouses are A. M. Lewis and Smart and Final.

Q. Can you think of any others, sir?

A. Well, the chains are Stator Brothers, Safeway, Alpha-Beta, and the others I can't recall at the moment.

Q. You say there are two others in addition to the ones you have mentioned?

A. Yes, I think there are.

Q. Where is the Certified Grocers facility which orders these products?

A. Well, they have three major warehouses in southern California.

Q. Do you recall the cities in which they are located?

A. Well, of course, the main one is in Los Angeles, and there is one out somewhere in the San Fernando Valley. I don't recall the address of the third one.

Q. But it's somewhere in southern California?

A. Oh, yes, they're all in the multiple southern California Market.

Q. Now, where is the A. M. Lewis facility that you refer to?

A. Well, they have a group of them. One is in Northridge, which is part of the metropolitan Los Angeles area. I don't recall the addresses of the other warehouses.

Q. Somewhere in California?

A. They're all in the metropolitan area or the major trading area of southern California, of Los Angeles, and they also have one in Phoenix.

Q. Where is the Smart and Final facility?

A. That's in Vernon. That's still Los Angeles.

Q. Where are Stator Brothers located?

A. Colton, California.

Q. And how about the Safeway facilities?

A. They're in metropolitan Los Angeles.

Q. Alpha-Beta?

A. I beg your pardon. Their warehouse is in a small town outside Los Angeles.

Q. Near Los Angeles?

A. For all intents and purposes, they're all in the greater Los Angeles area.

Q. How about Alpha-Beta?

A. They're in LaHabra, California.

Q. Now, the other two customers of yours which you couldn't remember are also located in southern California?

A. Yes. They're major chains. I should remember them.

Q. Could they be Vaughn's?

A. Thank you, Vaughn's is one of them.

Q. Perhaps we can refresh your recollection on the other. We will try to look it up.

A. As I say, I know that Ralph's and Market Basket and the third one are those that have never been sold.

Q. Are these sales arranged through Mr. Heckencamp's brokerage outfit or through some other means?

A. Well, these sales have been developed primarily to build up sales on the specialty items I mentioned, Buffalo Bill's Sarsparilla, and the other four items, and they have also asked if we could make them available to them, and General Beverage said that when the other products would be available they certainly would fill the order and start making products available.

Q. Now, I believe you testified earlier that Interstate Beverage Company handled the distribution of those products, Buffalo Bill, et cetera.

A. Yes.

Q. Now, was Interstate shipping Buffalo Bill and these other——

A. No. They have been concentrating in the Rocky Mountain states area.

Q. They have never sold in the California area?

A. No. To the West Coast.

Q. Why, as best you can explain it, do you have a separate corporation or separate company for the West Coast operations and another one for the Rocky Mountain?

A. Well, first of all, there is no connection between Interstate and General Beverage Interstate has its pattern of where it is going to be developed and General Beverage has its own pattern which is to be national distributors of national brands, which is a new concept in marketing and distribution to food chains and warehouses.

Q. Let me put it another way to see if we can understand this: has General Beverage made any profit?

A. No. Some minimal profits.

Q. Is it contemplated that General Beverage will make a profit or it is set up just as a service?

A. No. It is contemplated to posture, position and staff General Beverage to become a major national distributor of national soft drinks.

Q. Now, by that answer, do you indicate that it was postulated that it will be a profit-making organization?

A. Oh, yes.

Q. Who is it contemplated will receive the profits in this operation?

A. The company.

Q. Which company?

A. General Beverage.

Q. And is it contemplated that you will receive a hundred per cent of the profits of that company?

A. They may not be withdrawn. I mean General Beverage will be incorporated and we will act as a corporation. I may own 100 per cent of it with my wife and I may own five per cent. We are still in the stage of development on this whole project. I am.

Q. Have you discussed with Mr. Miller the forthcoming incorporation of General Beverage Company?

A. Not yet, and probably may only do it insofar as informing him.

Q. Have you discussed it with Mr. Devlin?

A. No, none of the gentlemen. Their concern is Interstate Beverage and Royal Crown Cola Company of Denver.

Q. Are they aware of your interest in this company, General Beverage Company?

A. I don't know.

Q. Have you deliberately not told them about your interest in this company?

A. No. We don't have that much communication, and our communication is basically once a year on what might be pertinent. At our next board of directors meeting we may have some agenda on that item and may not.

Q. Sir, did Interstate Beverage Company borrow money to finance the acquisition of the Royal Crown Bottling Co.?
A. Interstate has some debentures.
Q. Yes. Do you know to whom these debentures are payable?
A. Yes.
Q. Who is that, sir?
A. Mr. Devlin, Mr. Miller and Mr. Geiger's firm.
Q. Are they payable to them as individuals or on behalf of their firms?
A. Mr. Geiger's is on behalf of his firm.
Q. And Messrs. Devlin and Miller are in their personal capacity?
A. Yes.
Q. Personal investment on their part?
A. Personal moneys, yes.
Q. Just to save time—you may have stated this before—but did you say there were four stockholders of Interstate Beverage Company?
A. Yes.
Q. And are they yourself, Mr. Miller, Mr. Devlin and Mr. Geiger?
A. That's correct.
Q. Now, are Mr. Miller, Mr. Devlin and Mr. Geiger merely nominal stockholders? And by that I mean do they own just a very small percentage of the stock?
A. Well, the stockholders' agreement.
Q. What do you mean by that, sir?
A. It's an understanding between the four stockholders on where we start and where we end.
Q. Would you state in substance what the agreement is all about, sir?
A. I don't think I'm privileged to do that unless my directors approve of that.
Q. Is there any reason you can think of why they would not approve of that, sir?
A. I wouldn't conjecture what they might think.
Q. Is there any reason why you would not want that information to be known, sir?
A. None.
Q. Are you a major stockholder of the corporation?
A. Under the stockholders' trust, possibly.
Q. By that do I infer that all the stock is in a trust?
A. There is a stock agreement.
Q. But do you own any shares of the stock that you could walk out on the street and sell today?
A. Not today.
Q. Did you put up any money in connection with the formation of Interstate Beverage Company?
A. I would answer that no.
Q. Did you put up any other assets?
A. I would answer that no.
Q. Would it be fair to state that all the assets which were put up to form Interstate Beverage Co. came by way of the Wall Street principals that we have discussed earlier?
A. If you wish to characterize it that way.
Q. Does the stockholders' agreement provide that at some point in the future you will gain title to some of the shares of this stock?
A. It does.
Q. Would you tell us at what point in time that will occur, sir?
A. I would rather have the board of directors authorize me to reveal the details.
Q. Well, let me put it another way: does it occur on a fixed date or does it occur on some contingency in view of future events?
A. Both.
Q. When did you first meet Mr. James Miller?
A. I have known him for a good many years.
Q. Could you fix it just approximately when you first met him, sir?
A. Within the past 15 years.
Q. In what connection did you come to meet Mr. Miller?
A. Socially.
Q. When you were working in New York as a consultant?
A. No. I think I was in California. I was at both. I was in New York before he came out there.

Q. Were you ever involved in any business ventures of any sort with Mr. Miller prior to the time that Interstate Beverage was formed?
A. No.
Q. Have you been involved in any business ventures other than with Interstate Beverage and these related companies that we have talked about?
A. No.
Q. When did you first come to meet Mr. Paul Devlin?
A. Four or five years ago.
Q. In what connection did you come to meet him, sir?
A. Business.
Q. What business was that?
A. A program in the soft-drink industry.
Q. What program was that?
A. Acquisition of soft-drink companies.
Q. Explain whose program this was, please.
A. The marketing specialist.
Q. I'm afraid I don't understand your answer.
A. You asked whose program this was. Well, the program was developed by the marketing man, which was me.
Q. All right, sir. Was this a written program?
A. Well, it might have been something reduced to writing, I'm pretty sure.
Q. Do you normally reduce your programs and studies to writing, sir?
A. Sometimes yes, sometimes no.
Q. Would you say frequently you do?
A. It depends on what the matter is.
Q. Now, in connection with this matter, did Mr. Devlin ask you to formulate the program or did it come about in some other way?
A. I initiated the program and Mr. Miller and I discussed it.
Q. And did you discuss it with him shortly after initiating it, or after the program was in some degree of formation?
A. I don't recall.
Q. How many discussions did you have with Mr. Miller in connection with this program?
A. Possibly a half dozen.
Q. Where did these take place, please, sir?
A. Telephones?
Q. Yes, sir. In person.
A. Telephones.
Q. Any meetings in person in connection with it?
A. No.
Q. Pardon?
A. No.

[Ed's Note: Copy missing in submission.]

talking primarily of prime trading areas, whether it had the population and people and opportunity for sales development and growth. We weren't talking about a small city like Yreka, California; we were talking about a major area, and Denver is in that classification.

Q. Did your study include any discussion as to the legal effect of the license agreements, contracts that soft drink bottling companies have?
A. Mr. Miller wouldn't be interested in that, and I don't know what you mean, "legal."
Q. Well, I wasn't asking what Mr. Miller was interested in. I was asking——
A. We discussed the franchise system as it existed.
Q. Yes, sir. And what was the substance of your discussions about the franchise system?

A. I can't recall.

Q. Can't recall a word?

A. Oh, I could recall a word. You said the substance. The prime substance was the profitability of the soft drink business, whether it was good or poor.

Q. Do you recall, either in words or substance, what you said about the franchise license agreements or contracts that were in existence?

A. Very little. We didn't discuss it, because Mr. Miller knew I had an extensive or at least a long-term period of experience in marketing nationally known products, advertising and promoting them, and that I had worked behind the scenes with concentrate houses and knew what their problems and objectives were.

Q. Did you discuss with Mr. Miller the fact that the franchises were for the most part exclusive areas?

A. I think Mr. Miller would know, because Blyth and Company underwrote Seven-Up, so I think he knows a little bit about the soft drink industry, in terms of sales and profits.

Q. Is he a soft drink specialist of some sort?

A. I wouldn't say that. I would say he is an underwriting specialist.

Q. Did you have any discussion with Mr. Miller regarding whether the exclusive nature of these franchise agreements was enforceable or legal, void, or whatever?

A. I don't think Mr. Miller was concerned about that. He was more concerned about what could be done on sales development of the brands, and he was rather bullish on what could be done with Royal Crown and Diet-Rite brands, because of the quality of the product. I felt, with good advertising support behind it from the concentrate house, and licking some of the problems on distribution, we could develop good-sized business.

Q. Well, Mr. Alden, I don't mean to be critical of you, but this is continuing to happen, that I will ask questions and you answer something else rather than my question. I'm going to ask the reporter to read the question back to you and ask you to listen to it very carefully and try to give me a responsive answer.

(Question read.)

A. The precise answer is "No." I thought I answered it.

Q. Did you ever have any discussion on that topic with anyone, sir?

A. With anyone?

Q. Yes, sir.

A. In the world?

Q. In the world.

A. You are taxing me.

Mr. Brega. Well, I will agree that he has talked to me about it a number of times in the last week, if you want that on the record.

A. (Continued) Yes. Did I talk about what the legality was? Are you specifically saying, did I discuss the matter of territorial restrictions in selling soft drinks with anybody? Is that your question?

Q. (By Mr. Wallace) I will let you answer that question if you want to.

A. That is your question?

Q. Yes.

A. You are going to the heart of it. Yes, I have. I discussed it with the executives of Royal Crown when we first purchased the company. Mr. Durkee was Executive Vice President and we discussed an area-wide Ne-Hi program. I discussed the matters, the problems and changes that were going to take place with Mr. Smith. The subject was discussed with Mr. Wolfe when he was Vice President in charge of Sales, and then after he was made Vice President in charge of Western Operations.

I discussed it with Mr. Baril, who is the area manager. I discussed it with Mr. Baril, the area sales manager, with his successor and incumbent, Mr. Feld, and with Mr. Hitt, who is now regional area manager.

Q. Any others?

A. Mr. Heckencamp.

Q. Yes.

A. I was invited to go back to Washington—Judiciary Committee, Subcommittee Hearings, which they had for the soft drink industry. That is where I met Mr. Foster and had a chance to discuss the matter there with him.

Q. Anyone else, sir?

A. Oh, another half dozen or dozen individuals. But the important ones and the pertinent ones that I can quickly recall are the gentlemen I have mentioned.

Q. Mr. Alden, let me make the judgments about what is important.

A. I'm not quarreling with you.

Q. Yes, sir. Just name the others that you can remember.

A. Well, I have talked to some people whose names I don't remember, in Washington.

Q. Well, if you can't remember them by name, why don't you describe them in some way that would facilitate my identifying them, sir.

A. Well, one was a Mr. Wilson.

Q. Mr. David Wilson?

A. Yes, of the F.T.C.

Q. Did you talk to Mr. Robert Lee, at the F.T.C.?

A. What does he look like?

Q. Rather tall, thin, red-headed fellow.

A. I have talked to about a half dozen people. I know I talked to someone who was with Pepsi-Cola's legal firm back East some place. He came over to me to talk to me, and I don't know who he was and we were chatting—

Q. Pepsi-Cola's legal firm?

A. Yes.

Q. Do you recall when you talked to him, sir?

A. In Washington.

Q. This was during the hearings?

A. Before or after, or in between.

Q. Yes, sir. Anybody else, sir?

A. There were several other people whose names I don't know, and my chats with them were not on territorial restrictions so much as the food industry and the needs of the food industry to be serviced more efficiently by soft drink companies. And we did discuss the problems of brands in all packaged goods, food products, soaps, cigarettes, beers, whiskeys, wines, soft drinks.

Q. Yes.

A. We weren't talking anything that involved legal aspects. We were really talking some of the marketing needs and marketing problems.

Q. Yes, sir. Did you have any discussions with anybody about the legality or effect of the exclusive territories prior to the time you purchased the Denver bottler?

A. No, but my own observations were that the needs—I did talk to chain store people around the countryside, to get a relative picture on how important each of the brands were in their stores, what they had to say about the good and bad features of route selling into their stores, what they had to say about their preferences on warehouse buying and distribution through the warehouse. This didn't really involve restricted territories; this involved principles of more efficient merchandising and marketing or product. And they were not lawyers, they were people on the food front.

Q. Did you ever talk to any lawyers about the exclusive territorial area prior to the time you purchased the Denver bottler?

A. No.

Q. At that time, sir, that your purchased the Denver bottler, Royal Crown Bottling Company, did you read the franchise agreement, sir?

A. No, I didn't.

Q. Did people in connection with your other shareholders read the franchise agreement?

A. I can't say. I know our lawyers did, and they are quite adequate.

Q. Were you aware of the boundaries of the Royal Crown Bottling Company franchise at the time you purchased it?

A. Yes, we got a map and we were told that there were ten county areas there, which was the franchise area.

Q. Sir, I'd like you to describe in some detail how it came about that you and your principals purchased the Royal Crown Bottling Company of Denver. Who spoke to whom first, and just what occurred?

A. Well, I had set up some guidelines in the purchase of the first plant, which involved location of the plant on a favorable thermal chart basis. good population, good growth potential, good brand names; and the sharp focus was on the availability of Denver. We found this out—we had contacted the President of Royal Crown Cola Company in Columbus, Bill Uzzell, who we had known for twenty years. We told him what we were looking for, and he suggested we visit with the Vice President in charge of the West, which we did. And he gave us some figures on some plants, and the situation that looked like the most interesting was Denver. He didn't give us all the figures. Some of the figures we got later. But from the fragmentary figures or the figures that we got, we decided that it would be a good place to start.

Q. Now, you mentioned you got some figures from Bill Uzzell?

A. No, from Mr. Smith. Bill Uzzell——

Q. This is Ed Smith?

A. Yes. Bill Uzzell told us to contact his West Coast Vice President.

Q. Yes, sir. And that was Ed Smith at the time?

A. The Vice President contacted us. Mr. Smith called me.

Q. Mr. Smith called you?

A. Yes.

Q. Are you absolutely certain of that, sir?

A. Very positive—I think. I am quite positive—I think. I'm sorry—my recollection is that he called me.

Q. But you contacted——

A. If he didn't, I got a letter from him.

Q. But you contacted Bill Uzzell first, is that right?

A. Yes. I didn't know Mr. Smith, or even that Royal Crown had an office in San Francisco.

Q. What happened, what was the substance of the first contact with Mr. Smith?

A. The substance of it was that we were getting acqauainted, and I told him we were interested in buying a plant.

Q. Did you mention Denver, or were you just interested in a plant?

A. No, we didn't mention Denver. We didn't know what was available. He would know more about his operations.

Q. Did you set forth your guidelines to Mr. Smith?

A. In a nutshell, we said we wanted to get in—we didn't want to get into Minnesota or some of these cold weather countries, and we wanted to stay out of the deep south. We sort of narrowed it down; we would have preferred something in the West, west of the Mississippi, and I think we did have those guidelines, and we said we wanted a company that would respond to sales development, hadn't reached its peak of per capita consumption. And we also wanted not only the bottling, but also the canning activities.

He then suggested that we might look at the Denver picture, and we had several luncheons and I went over to his office once or twice, and he very graciously gave me some volumes of information, which I looked at and studied. And that is how it started developing.

Q. Do you recall the general nature of the information he let you look at and study?

A. Yes. I remember looking at the sales figures of several plants in terms of their case volume and what was purportedly their trend on sales, you know, going up or down, staying even. It was basically in that area of sales figures.

Q. Do you recall whether there was any discussion of the status of the operation here in Denver at the time prior to your purchase, whether it was flourishing or—

A. When we focused on Denver?

Q. Yes, sir.

A. He indicated they weren't too happy with the bottler in Denver, and he indicated that sales were going down, but he didn''t indicate they were going down as fast and as far as the figures I picked up in the office after the company was bought.

Q. How far did Mr. Smith indicate they were going down?

A. I would say it would be characterizd by the word, the phrase "We are not happy with the way sales are going now, they should be getting better."

Q. Did he make any specific representations regarding what sales were, or which way they were going?

A. He primarily said that they weren't happy with them, so I assume that they weren't growing, were either stable or maybe a slight decline.

Q. All right. Did Mr. Smith make available to you records of sales in his San Francisco office?

A. I think he did for the year 1968, but not comparative figures.

Q. Did you ask him for comparative figures?

A. I asked him to make available what he thought I should look at as an outsider, because I didn't want him to—I wasn't going to ask and be turned down on confidential figures. He made those available.

Q. What was the next step in this?

A. Well, he then said, if I had any interest, to contact the seller, and as I recall, I wrote the seller a letter.

Q. Do you recall who the seller was?

A. Beg your pardon?

Q. Do you recall what was the seller's name?

A. That I do.

Q. What is the name, please?

A. Domenico.

Q. Do you recall the first name?

A. Mal. But I didn't have—yes, I did get the name from Mr. Smith. It was Mal Domenico, or it may have been his father, Joe. I don't remember whether it was Joe or Mal that I wrote the letter to.

Q. But it was owned by the Domenico family, is that it?

A. The father and two sons. The father owned most of it.

Q. You said you wrote Mr. Domenico. Do you recall the substance of your letter?

A. Yes, I asked him if his plant might be for sale, and if so, what price and what terms.

Q. Yes, sir. Did you get a written response or—

A. Yes.

Q. Do you recall the substance of the response?

A. He said it would be for sale, they would consider a sale. They had another interested prospect in California. And when he said it would be available for sale, I said I would fly out and make an inspection of the plant and the key accounts in the market.

Q. Did you in fact fly out and make that inspection?

A. Yes, I did. I believe I did that in October.

Q. October of '68?

A. Yes.

Q. Did you also inspect Mr. Domenico's books?

A. Not at that time.

Q. When was the first time you inspected his books?

A. Well, he didn't really keep books. They had very little in the files, and Mr. Domenico was the accountant, and I asked him pertinent questions and he gave me answers, and so it's answers, I believe, that he excerpted from his books. The only thing I was really interested in was a statement of condition and the profit and loss.

Q. Yes, sir. Do you recall what Mr. Domenico said about the profit and loss and statement of condition?

A. Mr. Joe Domenico?

Q. Whichever Domenico gave you this information.

A. That's the one I was talking about, that gave me financial figures. Yes, I recall. I had the information on their sales for that year, and I had the information as best he could give it to me, on a rough breakdown on the assets, and also a rough breakdown on the liabilities. And then he had a yellow sheet which was his formal record that he used, as a statement of condition, which was a combination of an operating statement and a statement of condition—I don't know what you'd call it, trial balance sheet?

Q. Are you satisfied with the figures that Mr. Domenico gave you?

A. What do you mean by "satisfied?"

Q. Did you think that was more than adequate for your purposes, or did you think that the figures and books that he provided to you were inadequate for your purposes?

A. Well, I accepted what he gave me as the accurate index elements of a statement of condition and an operating statement. And I felt I had enough information to make a decision on whether to proceed further and ask him what his price was. And I wanted to find out how he wanted to sell, cash or terms, whether he would sell the assets or the stock. And that was basically the information I

was trying to determine, plus getting into the food stores and looking around and seeing how the brand looked in the food stores and how it was selling, based on observations and talking to store personnel.

Q. Yes. Is Mr. Joe Domenico a certified public accountant, to the best of your knowledge?

A. I wouldn't know. I do know that he has been an accountant for many years for the Climax Corporation, which is a substantial company, I believe, out here in the high country.

Q. Were you impressed with the orderliness of his bookkeeping?

A. No.

Q. Did you say anything to him on that first meeting when you looked at the pieces of paper about the lack of orderly bookkeeping or——

A. That was not the purpose of my visit. Obviously I lended my conversations mostly to questions on information I was seeking.

Q. Did your Wall Street principals request you to make any audit of these books or records that were available that Domenico——

A. They didn't request me to do anything except proceed to make a decision as to whether or not we wanted to buy the company.

Q. Do you recall the purchase price that the Wall Street principals put up for the company?

A. Would you restate your question? You mean what the company sold for? You mean the purchase price?

Q. I would like to have the reporter read the question.

A. Well, Interstate Beverage purchased the company for $658,000.

Q. Do you recall where that money came from?

A. I told you earlier where it came from.

Q. From the Wall Street——

A. From the Wall Street investors.

Q. Do you recall approximately what the annual volume of business was at that time?

A. The dollar volume was about $650,000.

Q. Do you recall approximately what the profit was?

A. Well, it was hard to determine how they arrived at their profits, but they had a bottom figure which was, as I recall, $40,000.

Q. And that was pre-tax or after taxes?

A. Pre-tax.

Q. And that was after the Domenicos had paid their family members their salaries?

A. Yes.

Q. Now, you said that their route sales were inefficient. In what way did you consider them inefficient?

A. Well, on the prime yardsticks that people measure route sales efficiency, number one, it cost so much to operate a truck, and their pay level didn't seem to attract very good men, it appeared to me at that time. I found out that that wasn't the problem. The deliveries each of the men made each day was quite low. In some markets, to illustrate, a driver will sell 185, 200, 225 cases. And these drivers were averaging in the low figures. As a matter of fact, I saw one figure where a driver only dropped off only 36 cases in a day. Then I also had the benefit at some point or other of a survey that Mr. Smith gave me which the Royal Crown people had made in this market which was to establish a relative position of Royal Crown in the marketplace in terms of share of market on various brands, which were on the low side.

Q. Any observations on the manufacturing facilities that the Domenicos were running?

A. Well, they didn't have canning facilities but they had a new bottling line which seemed to be a good line. It was very new. It was installed a year or two before that.

Q. Did you have any thoughts in mind at the time you acquired the license from the Domenicos to change their method of operation?

A. I didn't acquire the license. I bought the stock of the company.

Q. Yes. At that time did you have any plans to change the method of operation?

A. We felt that the route sales efficiency was low. We thought possibly they had too many routes running, none of them doing too well, as I saw it, plus the fact we felt that the chains would prefer to buy through the warehouse.

Q. Mr. Alden, as I understand it, that was your observation of what was wrong, in your opinion, with the way the Domenicos were operating?

A. I wasn't being critical. I was looking for areas of improvement.

Q. Now, what plans did you have at the time you purchased the shares of stock on behalf of yourself and the Wall Street bankers to change the method of operation of this facility?

A. Well, our plant objective was to show profitability on capital investment. And it came out of two areas: sales development and increase in efficiency, and the expenditure of dollars for manpower and promotion.

Q. Yes, sir, I understand that is the principle you have been talking about, but what specifically did you plan to do in terms of hiring or firing or changing the methods of distribution and so forth? What was it specifically that you had in mind? And I am talking about prior to the transfer of the stock to you. Prior to that time, what specific plans did you have in mind?

A. That was the area—increasing sales, increasing efficiency of the manpower that we were hiring.

Q. That is your stated objective. I want to know what your specific plans were. Did you plan to fire people, did you plan to get bigger trucks, did you plan to get new equipment, did you plan to change your customers? What did you plan?

A. On route sales, our plan was to increase the efficiency on each route, on the amount of cases they dropped off.

Q. How did you plan to increase the efficiency of each route?

A. Sales meetings, sales incentives, sales contests. We asked the Royal Crown man, who was the area manager, to review with the sales manager the number of stops on each route, the number of drops on each stop, to make recommendations on what could be done to increase the efficiency of each route.

Q. Well, did you have any views of your own of what could be done to increase the efficiency?

A. I believe I stated those views.

Q. Well, you keep stating objectives, but not giving me specific plans that you had.

A. I told you we had incentive programs, sales contests. Those were things that we did. We put to work the things that we thought would make each one of these men do a better job in their total tonnage for the day.

Q. Mr. Alden, I think we are having a little communication problem. Perhaps I could do it a little bit differently. Maybe we could get on with this. At the time you purchased the shares of Royal Crown Bottling Company, did you envision a continuation on a long-term basis of route sales as they are traditionally known in the industry?

A. We didn't entertain the ideas of discontinuing them. We hoped to make the route apparatus as efficient as possible, and it was very inefficient.

Q. Now, when did you assume a role in the day-to-day operations of the facilities?

A. In January the 2nd, 1969.

Q. Now, at that time, I think you said, there were twelve route salesmen. Were there any distributors?

A. Yes, they had at least one distributor.

Q. Could they have had three distributors?

A. They might have. Yes, I recall two now. They had a distributor in Boulder.

Q. Yes, sir.

A. And we decided to change from a distributor to a regular route, so we could have better control of that Boulder market, which needed building up. And Mr. Domenico had made that recommendation to me at the time we were reviewing some of the strength and weaknesses of its operation.

Q. Do you recall any distributors other than the Boulder distributor who you terminated?

A. Yes, I said there was another one.

Q. Do you recall where his area of interest was?

A. Well, we had a distributor who was going up into the mountains or the foothills, which would be west, and somewhere along the course we had a distributor who was going into Limon, which was east.

Q. How long did you retain the distributor who went into the mountains in the west?

A. He is still a distributor, I believe.

Q. He still is a distributor?

A. Yes, although I think the ownership of the distributorship changed. It is still called the same name.

Q. Do you recall when the ownership changed?

A. No, sir.

Q. Do you recall the quantity of products that were sold by this mountain distributor?

A. Well, it peaked during the summer months, because he went up into the vacation country.

Q. Let's put it on an annual basis, say for 1968—do you recall?

A. I wouldn't take a guess.

Q. Other than this change of name and so forth, has there been any change in the way the mountain distributor has operated today, as compared to under the Domenicos?

A. I don't know how he operated under the Domenicos. We know what his area is. Oh, we have a third distributor who has headquarters in Granby.

Q. Yes, sir, but back to the mountain distributor, do you know of anything in the way of his operations today which are different from the way he operated under the Domenicos?

A. Yes, I think we gave him a more generous promotional discount.

Q. Now, how does the mountain distributor's volume of sales compare today as opposed to under the Domenicos' operation?

A. I would say it is larger.

Q. How about the Limon or east distributor? What is the situation with him?

A. Well, the last I heard, he had sold the business to somebody and the man he sold the business to didn't show up, and I don't think we have been serving that Limon area now for a few, probably two months.

Q. How about the Granby distributor?

A. He has a multiple group of products that he takes into the mountains, mostly cans, because returnable glass hasn't come back.

Q. Do you know his name, sir?

A. I can't recall it.

Q. Have you ever been on the route with him?

A. Have I?

Q. Yes, sir.

A. No.

Q. Why not?

A. Well, that is not my province of operation.

Q. Who at your company goes out on the route with him?

A. No one goes out on the route with a distributor, as a rule, because distributors are independent contractors who operate as they see fit. I suppose if one invited oneself to go on the route, they would be accepted.

Q. Aren't you interested in how the goods are distributed by these people?

A. Distributors?

Q. Yes, sir.

A. You have no control once you have sold a distributor. You can discontinue the distributor.

Q. Are you interested in seeing how they are performing?

A. Well, we have a rough-cut picture on their purchases.

Q. Do you have a rough-cut picture on the coverage that is being achieved by these people in their areas?

A. It is very difficult, because these men are not the kind of men that study the market as well as they should. They are kind of hit-and-miss. And when there is a chance to drop off product, they drop it off. They have some permanent accounts, some temporary accounts.

Q. How long have you recognized that these people are sort of hit-and-miss in their operation?

A. Oh, I think that's been pretty well accepted by the soft drink industry, ever since I can remember.

Q. Have you taken any steps to try to correct this?

A. No, because it's a small share of the business that Granby does, and the distributor—this Rainbow, that is a small share of business.

Q. Rainbow is?

A. Rainbow Distributing.

Q. Who are they?

A. Rainbow.

Q. Now, who is responsible for analyzing this rough-cut picture of what these people do in their routes?

A. Well, that comes under the province of the sales manager's activities.

Q. Mr. Hunt?
A. Yes.
Q. Does Mr. Hunt ever ride the routes with any of these people, Limon or Granby or Rainbow?
A. I'm not certain. He's been out on routes and he even drives a route himself because of shortage of manpower.
Q. Can you tell us the last time Mr. Hunt inspected the shelf space situation, say, in Mr. Granby's route?
A. No. I couldn't tell you.
Q. Can you tell us the last time that you inspected the shelf space situation in the Granby area?
A. There isn't much shelf space there. There are a lot of on-premise consumption pop places. I was through the area about a year ago.
Q. A year ago. When was the last time you went on the route with your man from Limon?
A. I don't ride routes.
Q. When was the last time Mr. Hunt went on that route with that man?
A. I have no knowledge.
Q. When was the last time you checked the shelf space situation in the Limon route area?
A. I have never checked it.
Q. When was the last time Mr. Hunt checked the shelf space situation in the Limon area?
A. I don't know.
Q. Going back to the time period just prior to your purchase of the stock of Royal Crown Bottling Company, at that time did you contemplate sales of Royal Crown products for distribution outside of the exclusive area of the franchise?
A. At that time I was looking at the problem right here locally, one thing at a time.
Q. You did not contemplate sales outside of the area?
A. Not immediately. Of the Royal Crown products, or products that were made at Royal Crown?
Q. I am talking about the Royal Crown products under your license.
A. We were talking about the program that we were going to start with here, where we had many problems.
Q. Beg your pardon?
A. We had many problems here.
Q. At that time did you contemplate acquisition of surrounding franchise licenses of Royal Crown?
A. Not specifically surrounding.
Q. Did you contemplate neighboring or——
A. Not specifically neighboring. We were going to look at anything that might be available.
Q. But you did contemplate, you say, the purchase of other exclusive franchises?
A. Contiguous to the area?
Q. Yes, sir.
A. No.
Q. Did you contemplate purchase of any of them, anywhere?
A. No. Anywhere?
Q. Yes, sir.
A. Well, we were interested in the Salt Lake City plant.
Q. Yes, sir. Did you ever express an interest to anyone at all in purchasing contiguous franchise licenses?
A. No, I don't recall, because there are only two contiguous ones that I can think of. I haven's spoken to them about it.
Q. Well, I am not saying you spoke those franchisees. I am asking you if you spoke to anybody about the possibility of you or your principals' purchase of those franchise licenses?
A. I don't recall.
Q. Do you recall even thinking about it?
A. If I had thought about it, it would be something naturally to think of expanding your marketing area.
Q. Did you say for sure you didn't discuss it with anybody?
A. I don't recall. I may have discussed it with an area manager, to find out if there was any thought on anybody's part to sell.

Q. Did you discuss it with one of the Domenicos?
A. Referring to what?
Q. Referring to brand acquisition by you of some contiguous areas?
A. Yes. And I didn't recall any specific occasions.
Q. Then I asked you, do you recall speaking to Mr. Domenico about that?
A. I may have.
Q. Do you recall the substance of what you and he said about it?
A. Well, I only may recall. I don't think I did, and I may have.
Q. For what period of time after the acquisition of the Royal Crown Bottling Co. did you maintain twelve route salesmen?
A. It was to a relatively short period of time, between three and six months.
Q. What happened in three or six months? In other words, how many route salesmen—
A. Well, several things: the production manager and his brother left. We talked to some of the route people, and one or two route people quit. I think we may have been down to ten. And the sales manager, whom Royal Crown said was quite incompetent, we didn't want to make any changes until we had a chance to gauge and measure. We agreed with the Royal Crown people and we brought in another sales manager who had experience with foods and packaged foods.
Q. Who was that?
A. Mr. Hunt.
Q. Could you give us the approximate date that Mr. Hunt was brought in?
A. St. Patrick's Day, 1969, 17th of March.
Q. Could you tell us whether Mr. Hunt has ever been in the soft-drink business before this time, sir?
A. I don't think so.
Q. Had Mr. Hunt ever been involved in any business relating to the distribution of food on a door-to-door delivery basis?
A. On route selling?
Q. Yes, sir.
A. I don't think so.
Q. How long had you known Mr. Hunt before St. Patrick's Day, 1969?
A. Several months.
Q. How did you come to meet him?
A. We were recruiting personnel. Either we ran an ad or some employment agency.
Q. Now, how long did you maintain your route salesmen force at the number of ten?
A. If there was any decimation, it was the result of people quitting and replacing them. We ran into a violent period of turnover and we told the Royal Crown people we needed some help.
Q. Do you recall when this violent period of turnover was?
A. The early part of '69.
Q. Would you say it was in January, February, March?
A. Probably began in February and became accelerated in the early spring.
Q. Do you have any idea of the volume of people who turned over during that period?
A. I know at the end of the year we had a fantastic turnover of route sales personnel. I remember that specifically.
Q. Well, let's approach it another way: do you recall at the end of 1969 the number of your original twelve route salesmen who were still with you?
A. At least half.
Q. At least half? Do you recall the names?
A. It's very difficult to recall the names at this specific time period.
Q. Do you recall any of their names?
A. Yes. One was a man by the name of Gallegos.
Q. Do you recall any other specific names?
A. Also a man by the name of Shepherd.
Q. Do you recall his first name?
A. No. I always called him Shep. I think it might have been Wayne.
Q. Do you recall any other names, sir?
A. No, I don't.
Q. How often did your company have sales meetings with the route salesmen during the year 1969?
A. Oh, there was short meetings practically every week and more formal meetings several times each quarter.

Q. Did you attend all of these meetings, sir?

A. I originally was conducting the meeting and then I turned it over to the sales people.

Q. Which sales people was it turned over to?

A. Mr. Hunt.

Q. Do you recall the approximate duration of each of these sales meetings in 1969?

A. Well, they vary. Some of them we invited all the sales personnel over to a local restaurant in the area. I had dinner and conducted the meeting. Those kinds of meetings would last from maybe seven o'clock until ten or 10:30. Other meetings were held on a Saturday morning and could have lasted a couple of hours. Other meetings were short morning meetings and probably lasted for half an hour before the men went out on their routes. And some of the meetings were conducted on a Friday evening where the men had sandwiches and beer sent in. So they ran between the short sorties of a half hour and the full ones of about three hours.

Q. Would you describe Mr. Hunt's function with Royal Crown Bottling Co.? You have given us his title. Could you give us his function?

A. His responsibilities were sales development, handling sales, sales personnel.

Q. Would he have authority to do such things as change the routes or change the stops on a route without clearing it with you?

A. Oh, yes.

Q. Did he have authority to change the prices without clearing it through you?

A. No. That's a company policy on pricing. We discussed it and got the courtesy of his thinking and we would either have mutual agreement or try to have it a community piece of thinking on pricing.

Q. I detect from your answer that the policy decisions are made by you as president?

A. On sales or company policy

A. Company policies, yes.

A. Well, I would be making company policy.

Q. Would anybody else in the company be making policies?

A. Mr. Hunt has the leeway to make decisions and policies on sales programs.

Q. Mr, Alden, do you recall in 1969 how many times you rode on the route with your various route salesmen?

A. That I rode on the route?

Q. Yes, sir.

A. I stopped riding routes a long time ago.

Q. Do you recall if by a long time ago you mean prior to the acquisition of this?

A. Many years ago.

Q. Do you recall how many times Mr. Hunt rode on the route with the various route salesmen?

A. Yes, he and the supervisors—they rode on the route with all new men. training them; and when they weren't riding on the route training new men, they went out with some of the weaker ones, and they'd make spot checks on the routes of some of the better men, to see how things were going and looked. That was a continuous activity that they were engaged in. And we did have one or two routes that a Royal Crown representative rode on.

Q. Now, Mr. Alden, how much do you presently pay your route salesmen?

A. As of which payroll week? This week, or last week? The reason I——

Q. Let's take June, the first week of June. How much did you pay your route salesmen in that week, sir?

A. The route salesmen were paid a guarantee of eight dollars a day, 17 cents a case on products sold, and 9 cents a case on glass brought back.

Q. Now, say for the first week of June—and I know you don't have the precise figures in front of you right now, but what would be the approximate gross per day for an average route salesman in your company

A. That is an impossible figure to give you, an average gross per day. I can give you the range.

Q. Well, could you give us the range then, please.

A. Yes, the range ran anywhere from 50 cases to 175, 200.

Q. So from that, according to my mathematics, 50 cases times 17 cents a case would be about $8.50, so the low man would make a total of about $16.50, is that correct, sir?

A. I am not following your mathematics, but if that is the right application of the figures and the answer is correct, that would be right. But, of course, we feel that a man should sell 135 cases a day in order to break even on having that man take that equipment out. We have our figures on the basis of cost per truck mile, cost per case per mile, and at that basis we are losing money and we are very unhappy about it. But we keep them on to service the stores.

Q. Sir, do you know the basis on which the Denver Coca-Cola bottler pays his drivers or route salesmen?

A. They are union. The largest soft drink operation in town is Pepsi-Cola, and our understanding is that they pay 15 cents commission on glass items, 12 cents on cans, and 7 cents on returnable glass, without any guarantee.

Q. Do you have any rough idea of what their average——

A. Pepsi-Cola drops?

Q. Yes.

A. Yes, we understand their drops run anywhere from 200 to 250. We have even heard men drop off 300 cases a day.

Q. What was the route salesman's compensation plan at the time you acquired Royal Crown Bottling Company?

A. As I recall, it was a commission rate much lower. It was about 10 cents a case; it may have been 12—I think it was 10, and 5 cents on returnable glass.

Q. Mr. Alden, at the time you acquired Royal Crown Bottling Company of Denver, do you recall the wholesale price, the price that your route salesmen charged retailers, for Royal Crown Cola products?

A. Yes, I do recall.

Q. Could you state for the record what Royal Crown Cola was per case?

A. The 16-ounce was two dollars a case, and Diet-Rite was $1.85 a case.

Q. Is that 16-ounce also, sir?

A. No, that was 10-ounce.

Q. Were these returnable bottle cases?

A. Yes.

Q. Now, you are talking of December, 1968, on those prices?

A. I am talking January, February, '69, which is the same as '68. There was a price advance, as I recall, April 1, 1969, in which the entire industry simultaneously increased prices, unbeknownst to each other.

Q. What did you increase your prices to on April 1, sir?

A. The pattern on the returnable glass price seemed to be in the same range as the rest—$2.00 on the 10-ounce and $2.40 on the 16-ounce, plus bottle charges of course.

Q. This is returnable glass?

A. Right.

Q. And would that apply to Royal Crown Cola as well as Diet-Rite, sir?

A. Yes. On the sizes, the 10-ounce of both were $2.00, and $2.40 for the 16-ounce R.C.

Q. Do you recall when the next price advance was by Royal Crown Bottling Company here in Denver?

A. After April 1, '69?

Q. Yes, sir.

A. I do not recall that date. It was when simultaneously everybody else seemed to raise prices the same day.

Q. Do you recall approximately how many months after April 1, '69?

A. I think the can price was at $2.60, as I recall it.

Q. And do you recall of the prices which were next in effect?

A. The next price schedule change, as I recall, was on cans only.

Q. All right, sir. And what was the price there?

A. I think the can price was at $2.60, as I recall it.

Q. That would be a case of twenty-four, 12 ounces?

A. Yes.

Q. Twenty-four cans of 12 ounces. What were cans prior to that period, sir? Let's start back in the December '68–January '69 period. How much were they then?

A. I believe they were then two sixty also, per case.

Q. And on April 1 of '69, were cans also two sixty per case?

A. As I recall.

Q. And then a year later they still were two sixty per case?

A. As I recall.

Q. Are they still two sixty per case?
A. No, there was a price change a year after the '69 change.
Q. And what did they go up to, sir?
A. Some of them went to $2.75 and some went to $2.85.
Q. That's about a year after April 1, of '69?
A. As I recall.
Q. Now, has there been an increase since then, sir?
A. Not to my knowledge—not in our prices.
Q. Royal Crown products which you sell to retailers in the Denver area are $2.75 a case, can price?
A. $2.85.
Q. $2.85 now?
A. Yes.
Q. Sir, going back to the December '68–January '69 time period, do you recall what the price for Pepsi-Cola was at that time?
A. The returnable glass and cans, as I told you, were all at the same level.
Q. Prior to the time you acquired Royal Crown Bottling Company, they were at the same prices?
A. Yes, sir.
Q. Are you sure that they weren't slightly lower for Royal Crown products, sir?
A. Well, the reason I'm sure is that the Royal Crown people were telling us we didn't understand this pricing, we should go below parity, and I recall that we pointed out, well, the prices had been sitting at the same price level as competition. So I am fairly certain it wasn't lower.
Q. By that statement, do you mean to say that Royal Crown suggested that Royal Crown might sell better if it sold at a price cheaper than Coke or Pepsi?
A. Oh, yes, they had repeatedly said the way to sell is below Pepsi and below Coke, and "You will sell more of it," and the other phrase they use is "We can deal a lot."
Q. Did you ever try selling your products at a price below the price of Coke and Pepsi?
A. We have had promotional programs where we have had a price off deal.
Q. Were the promotional programs failures?
A. It depends on what yardsticks you use to measure success or failure. Sometimes economically they were failures. Tonnage-wise, more product, more juice, was sold.
Q. Sir, do your route salesmen work on Saturday?
A. Some of them.
Q. Sir, do you compensate your route salesmen for holidays?
A. We are non-union. They are paid for the days they work, which is a policy followed by the other non-union shops in town.
Q. Yes, sir, but do you say on Christmas Day or New Year's, if it falls on a weekday—are they compensated for that day, sir?
A. Not to my knowledge.
Q. Now, is this the case with the Pepsi route drivers, sir?
A. I don't know.
Q. The drivers here in Denver?
A. I am not familiar with the intimate details of how Pepsi does it.
Q. I'm not asking the intimate details.
A. I don't know whether they pay men on days off or not.
Q. Have you heard anyone say that Pepsi route salesmen are paid for——
A. When they don't work? I have not.
Q. Have you heard that Pepsi route salesmen are paid for legal holidays which fall during the week?
A. I have not heard they have been paid.
Q. Have you heard your route salesmen complain about not being paid for these holidays?
A. I have never heard of it.
Q. Have you heard it through someone else, say Mr. Hunt or one of your supervisors?
A. No.
Q. Mr. Alden, did you ever disclose before today, other than to your principals on Wall Street, the purchase price for the Royal Crown Bottling Company?
A. I think it was fairly common knowledge before I even came to town, what the business had sold for.

Q. Had you ever discussed it with anybody else?

A. I may have mentioned something to somebody with the Royal Crown Cola Company, insofar as pointing out that with this investment we had to do what we could to develop profitable sales.

Q. As I recall, earlier in your testimony you said the purchase price was $568,000.00?

A. No, $658,000.00, I think.

Q. Thank you. Have you ever represented to anybody in any way that the purchase price was at some figure other than that?

A. Yes, I have made a statement that—there was a query on whether the company would be for sale, and I said it would be, that it would be in the area of a million dollars.

Q. Excuse me, I think maybe you misunderstood me. Have you ever made any representations or discussed how much you and your principals on Wall Street paid for Royal Crown Bottling Company, other than the $658,000.00 figure?

A. I haven't discussed these things with anybody.

Q. Do you recall ever telling anyone that you paid $1,100,000.00 for Royal Crown Bottling Company?

A. No.

Q. Who did you tell that your company could be purchased for one million dollars?

A. Well, I had a man come in the office one day, and he said he had a bright idea, he wanted to buy Royal Crown, and at the same time he was negotiating to sell his company.

Q. Do you recall his name, sir?

A. Mr. Howell.

Q. When was this, sir?

A. Sometime in the spring, as I recall.

Q. What did he say to your one million dollar offer?

A. He said he'd like to study it.

Q. Have you had any further communications on that?

A. We had one meeting and some lunch, and I asked him if his company was for sale. He said no, and he said he needed a Cola. And, in essence, he was debating whether he wanted to buy the whole company or just wanted to buy the franchises and glass, and we discontinued conversations, because it turned out that—we told him we'd be only interested in selling for cash, and that completed it.

Q. Have there been any other discussions, Mr. Alden with anybody else?

A. Not that I can recall at this setting.

Q. Do you recall ever mentioning to Royal Crown Cola Company——

A. Yes, in the heat of a discussion with Mr. Wolfe, I said, "The company is for sale, and we've got over a million dollars in it—you cay buy it."

Q. Do you recall discussions with anybody else on that subject?

A. No. Well, we did have a couple years ago—there are always people passing through town who wanted to know if the company were for sale. There are a lot of multiple plant operations throughout the country, shopping around for plants.

Q. Mr. Alden, you have mentioned a number of trips that you have made, surveying the situation, talking to brokers and so forth—for example, Mr. Heckencamp?

A. You mean field trips?

Q. Yes, sir, field trips—Mr. Heckencamp and so forth. Do you keep records or does your company keep records of your travel expenses and so forth?

A. Well, records of travel expenses on disbursements, whenever travel expenses are turned in.

Q. Is there a special travel expense account book or account ledger that would contain this information?

A. Just vouchers that are issued against what might be involved.

Q. Are your travel receipts and vouchers and so forth stored in a particular file?

A. The ones that are turned in, yes.

Q. Now, when you, for example, visit Mr. Heckencamp——

A. I didn't visit Mr. Heckencamp. I met with Mr. Heckencamp.

Q. While you were in California, as I recall.

A. I have been out on the West Coast a number of times, yes.

Q. Are these travel expenses paid for by Royal Crown Bottling Company?

A. No, not in any—anything that doesn't involve Royal Crown, they don't pay any expenses.

Q. Well, how do you determine what involves Royal Crown?

A. My judgment. If it isn't a Royal Crown expense, it isn't turned in as a disbursement on behalf of Royal Crown.

Q. Do you keep a diary, an appointment book?

A. Notes.

Q. Do you have an appointment book?

A. Not a formal appointment book. I have scratch pads.

Q. Do you have a pocket calendar?

A. Yes, sir.

Q. Do you save them from year to year?

A. Only for tax purposes.

Q. Do you have your 1967 pocket calendar for tax purposes?

A. I doubt it. I don't need it.

Q. Do you have your 1968 pocket calendar?

A. No.

Q. Do you have your 1969 pocket calendar?

A. No.

Q. Do you have your 1970 pocket calendar?

A. No.

Q. Do you have your 1971 pocket calendar?

A. I believe I do.

Q. Do you know where that is located, sir?

A. Somewhere in my office area, in my home, I suppose.

Q. Do you know when you discarded your 1970 pocket calendar?

A. Discarded? You mean disposed of it or discarded it, took it and set it aside in my files, or threw it away?

Q. Well, I don't know where it is. What did you do with it?

A. I don't have it. I threw it away. I have no need for it.

Q. Do you know when you threw it away?

A. I threw it away when I had no need of it for taxes.

Q. Mr. Alden, you referred a few moments to your discussion with a Mr. Howell. Could you state for the record his first name?

A. William.

Q. Is this the young Mr. Howell or the older?

A. He's the father.

Q. He is the father of Mr. John Howell?

A. Yes.

Q. How long has Mr. Mark Day been with your company, sir?

A. Approximately four months plus.

Q. Now, am I correct that his title is production manager of the Royal Crown Bottling Co.?

A. His assignment is production.

Q. He does not have a title?

A. No, not really.

Q Do you know what his prior employment was?

A. Yes. He was a Viet Nam war veteran. I don't know how long he was over in Viet Nam. And prior to that he had done work on quality controls with Morton Salt.

Q. Do you know what kind of quality control?

A. No, sir.

Q. Did he have any prior experience in soft-drink manufacture, to your knowledge?

A. No.

Q. Did he have any prior experience in soft-drink quality control?

A. Not to my knowledge

Q. I believe you testified that by the end of 1969 you were down to about six route salesmen. Do you recall that testimony?

A. Was that 1969 or currently?

Q. The end of 1969.

A. If I made that statement, that's correct.

Q. Now, during the first quarter of 1970, did your number of route salesmen at any time increase or decrease?

A. It went both ways.

Q. Well, which way did it go first?

A. I can't recall.

Q. How high did it get during the first quarter of 1970?

A. I can't recall. I can tell you that we went down low and discussed these problems continuously with the Royal Crown people. They would do certain things to alleviate and help and nothing happened, and we kept recruiting. And some of the recruiting was successful and some was terminated. And we had a range that went up, I think, as high as ten, maybe eleven people. That was the high.

Q. How long did that last?

A. I believe for about a year or so.

Q. Is your testimony now that you had at least ten route salesmen during all of 1970?

A. I said a high. I didn't say all. I said a high of ten.

Q. How long did the high last?

A. I can't recall. I'd have to see my records.

Q. Did it last more than a week, Mr. Alden?

A. I believe so.

Q. Did it last more than two weeks?

A. I believe so.

Q. Can you swear to that for sure today?

A. I would like to review the figures. I don't carry these figures in my mind, particularly on specific time dates.

Q. Mr. Alden, at the time you were considering purchase of Royal Crown Bottling Co., did you make some market surveys or studies?

A. When I was looking at the soft-drink industry as an industry.

Q. I'm talking about Denver in particular.

A. Well, both, looking at it as the soft-drink industry and then looking at Denver specifically.

Q. Now, what kind of surveys did you make in connection with Denver specifically?

A. We took areas of the metropolitan Denver area, Bouder, Longmont, coming in towards town, Northglenn. We checked primarily the supermarkets, studied the facings of the competition, tried to measure the retailer's attitudes towards the various brands without indicating what interests we had in any brand whatsoever. We checked some of the smaller stores such as 7-Eleven. We checked some of the on-premise consumption places. We took a quick look at what we thought might be helpful on pre-mix and post-mix activities. We checked shelf pricing and consumer attitude towards promotion.

Q. Anything else?

A. I'd say in general what any good orderly marketing evaluation would be, which is primarily astute observation and conversations with store traffic and store personnel.

Q. Now, was all of this study conducted between the time you had your first contact with Mr. Ed Smith and the time you closed the deal with the prior owners of Royal Crown Bottling Co.?

A. Was that the sole study?

Q. Yes, sir.

A. You asked what I had done before that, and I told you I had been in Denver and spent two days at it here.

Q. Yes, sir. Did you write up your study there? Did you take any notes?

A. Well, I must have made some mental notes and written notes.

Q. Where are these written notes today, sir?

A. I don't know.

Q. Where are the studies that you made in the Denver market prior to your first contact with Ed Smith?

A. I didn't make any prior to Ed Smith. Smith was the one that suggested that Denver might be available.

Q. I'm sorry. I misunderstood your answer or you misunderstood my question. You testified a few minutes ago about going around to a lot of stores and checking prices and getting attitudes.

A. Here, for two days.

Q. Here in Denver?

A. For two days.

Q. Now, is your two-day Denver study the only study you ever made on the Denver soft-drink situation?

A. No. You asked if——

Q. Let's not debate about it.

A. I would like to follow your frame of thought.

Q. Let's just wipe the slate clean. Is the two-day study in October of 1968 the only study you have made on the soft-drink situation in Denver prior to closing of the deal with the prior owners of Royal Crown Bottling Co.?

A. That was the only one made prior, which I had testified to.

Q. All right, sir. Now, do you know where that study is located?

A. I said those were mental and some written notes.

Q. Do you know where the written notes are located?

A. I said I didn't know.

Q. Where do you think they are likely to be located?

A. I wouldn't even answer that. I don't know.

Q. Can you recall discarding them?

A. Well, what I didn't have any need for I probably threw away.

Q. Mr. Alden, do you mean to tell me that you, on behalf of these Wall Street financiers, purchased something for $658,000 and you threw your market study away?

A. I'm telling you precisely what happened.

Q. Do you recall when you threw it away, Mr. Alden?

A. I think they were probably thrown away as discussions were held with people in the sales operation and we got some thought and direction and some instruction from them on procedure to correct some of the things.

Q. Could they have been thrown away in the last six months, Mr. Alden?

A. Hardly, no.

Q. Mr. Alden, do you recall the amount of cash on hand for Royal Crown Bottling Co. when you took over?

A. In the bank?

Q. In the bank, in the vault, in the safe, in the pocket.

A. I think there were approximately 80-some thousand.

Q. How long did that cash situation remain at that level?

A. Well, it took a precipitous drop because it ended up wth accounts receivable which totaled around 35,000 or 40,000.

Q. When were your accounts payable 35,000 or 40,000?

A. Those were accounts payable that were paid in the month of January, as I recall.

Q. Was any additional money put into the Royal Crown Bottling Co. after its acquisition by you in behalf of the Wall Street interests?

A. No. Our working capital was generated by sales which was piled back into the business on buying more raw materials and supplies.

Q. At any time has Mountain States transmitted any additional funds to Royal Crown Bottling Co.?

A. I don't understand your question.

Q. Since the date of acquisition, has any cash flowed from Mountain States to Royal Crown Bottling Co.?

A. No.

Q. Has any cash flowed from any of these stockholders of Mountain States other than yourself to the Royal Crown Bottling Co.?

A. No.

Q. Have you requested any additional cash from Mr. Miller?

A. No.

Q. From Mr. Devlin?

A. No.

Q. From Mr. Geiger?

A. No.

Q. Have they experssed any position to you at any time as to whether they would or would not provide additional cash?

A. No, because it was never discussed.

Q. Are you on friendly terms with Mr. Miller?

A. Yes.

Q. With Mr. Devlin?

A. Yes.

Q. With Mr. Geiger?

A. Yes.

Q. Did they instruct you to bring this lawsuit?

A. No.

Q. Were they aware of the bringing of this lawsuit?

A. To a degree.

Q. What do you mean by that, sir?

A. Whatever is necessary to protect the interest of the company to maintain our position in the marketplace, generating sales and making profits.

Q. Have you ever discussed with Mr. Miller, Mr. Devlin and Mr. Geiger the fact that your license agreement with Royal Crown provides for a certain limited area of exclusivity?

A. There is a clause there that talks about a restricted territory.

Q. Have you talked about that clause at all in any respect whatsoever with Mr. Miller or Mr. Devlin or Mr. Geiger?

A. Not the clause in the Royal Crown agreement, but the FTC actions that have been taken under the Supreme Court decision on the Schwinn and Topco decisions.

Q. Do you recall when you first talked the situation with Mr. Miller?

A. I beg your pardon.

Q. Do you recall when you first discussed this situation with Mr. Miller?

A. Which situation?

Q. The clause in your licensed arrangement providing for an exclusive territory.

A. I didn't refer to the Royal Crown franchise. I referred to the economic climate and the legal picture in the soft-drink industry.

Q. What did you say specifically?

A. As I stated, the FTC action and the Supreme Court decisions indicated some possible changes in the structuring of the soft-drink industry.

Q. Did you talk about possible changes in the law?

A. What law?

Q. I'm asking you what you talked about. I wasn't there, Mr. Alden.

A. I just told you. You asked me if I talked about possible changes in the law. Do you mean the anti-trust laws?

Q. Yes, sir.

A. I told him that there was a series of conferences going on now, that there had been quite a lobbying job being exerted in Washington on legislators by the National Soft-Drink Association and its members, and that there were hearings being held by Mr. Hart, Senator Hart.

Q. What did Mr. Miller ask you in this conversation?

A. He listened.

Q. He didn't ask any questions?

A. I don't recall any.

Q. Is he by nature a non-inquisitive person?

A. I wouldn't describe Mr. Miller's personality.

Q. Well, I'm afraid you're the only one here who knows him. I think we ought to get it from you.

A. Well, he's been a very successful man in his field. So I would say his work habits are excellent.

Q. Did Mr. Miller inquire about the status of the FTC case that you have referred to in this case?

A. I was relating it to him.

Q. How did you describe the FTC case to him?

A. I described it as a position of the FTC which I considered very proper in terms of the food store needs today, which is warehouse selling, and I related to him some of the things I related to Senator Hart's committee, which is available, which in essence pointed out that the legislation was going to have very little effect, really, on the attrition on the small bottlers unless the small bottler has a chance to generate sales.

Q. Mr. Alden, did you tell Mr. Miller the status of the FTC case? Did you tell him whether it had been decided or not decided or under advisement, or how did you describe it?

A. Well, I very briefly tried to give him the picture that existed, which I think also had been running in the Wall Street Journal and financial publications, and indicated to him that there was a very strong trend in that direction, and I felt that possibly the last effort gasp was the attempt to get some legislation to modify anti-trust laws.

Q. Did you tell him that what you call a trend had already achieved some result? Didn't you say it was something that was coming in the future?

A. Well, there are two companies that have waived territory restrictions, and I, in a confidential visit with my director, tried to inform him as fully as I could.

Q. Well, what words did you use?

A. I feel that my conversation with my director is privileged.

Q. Mr. Alden, you may feel that way, but you brought this lawsuit against my client, and I have some questions for you and I'm afraid you're going to have to answer them.

A. I'll do the best I can.

Q. Thank you. Would you proceed and describe your conversation with Mr. Miller?

A. I have described those in substance.

Q. I want the rest of it.

A. That's all of it.

Q. In one breath you say that's all of it and in another you say that's substantially it. What is it that you said that was privileged? Let me hear that part of it.

A. Any conversation that would have to do with my director.

Q. Well, that's what we want to hear right now.

A. Not if it isn't pertinent to the lawsuit.

Q. Well, I think it is pertinent to the lawsuit, Mr. Alden. You have asked for emergency relief from the Court, and I think that the Court and my client have the opportunity to know what your discussions with Mr. Miller were all about.

A. Oh, we weren't going there for the counsel with them. We were there merely to tell them what had happened in Washington. And we reported what happened at Senator Hart's committee and what the essence was of the talks and presentation made by the various people there.

Q. How did you decribe the FTC action to Mr. Miller?

A. Well, in essence, I pointed out they had taken the position and so notified a number of concentrate houses.

Q. Did you tell Mr. Miller whether the FTC had prevailed in the position they had asserted?

A. No. But I made the observation that I hoped and felt they would.

Q. Did you give any percentage odds about whether the FTC would or would not prevail?

A. I'm not that qualified.

Q. Well, I am asking you whether you did, not whether you were qualified to.

A. Not being qualified, I didn't give them any figures or percentages.

Mr. Brega. Mr. Alden, just answer the question. The answer to the question is "No." That will make this thing go a lot faster. Don't keep going on into something else.

Q. (By Mr. Wallace) Mr. Alden, how did you describe the likelihood or unlikelihood of success of F.T.C. action when you talked to Mr. Miller?

A. I indicated that my observations were that there would be no legislation and that a very important decision was coming up which would pretty well cast the die one way or the other.

Q. Did you indicate which way the die was likely to be cast?

A. My opinion is that it would be favorable to no restrictions in territories.

Q. Did you tell him it was a sure thing?

A. No.

Q. Was this meeting with Mr. Miller a day or two after your Congressional testimony, Mr. Alden?

A. I flew into New York and saw him for about a half hour.

Q. Who else was present at the meeting, sir?

A. Mr. Geiger.

Q. Anybody else, sir?

A. No.

Q. Did Mr. Geiger express any opinions regarding the likelihood or unlikelihood of success of the F.T.C. action?

A. No.

Q. Can you recall the precise words you were using? I am particularly interested in the part of your conversation where you said the die had not yet been cast. Can you recall the precise words you used in that part of the conversation?

A. No.

Q. Did you ever have a similar conversation with Mr. Devlin?

A. No.

Q. Never?

A. No.

Q. Now, I am not restricting it to this month or last month. I am talking about at any time.

A. I never discussed the F.T.C. action or legislation or anything in that area, with Mr. Devlin.

Q. When did you first hear of the lawsuit in California relating to Mr. Foster's Taft Coca-Cola situation?

A. I don't recall.

Q. Do you recall whether you heard about it prior to going to Washington last month, sir?

A. Oh, yes, it was in the trade press; that's where I first learned about it. But I don't know at what date that was.

Q. Do you read a publication called—I believe it used to be called "Soft Drink Insider" and I think it recently changed its name to "Leisure Beverage Insider Newsletter."

A. That poop letter? Yes.

Q. Yes, sir. Do you recall reading any stories in that or other industry papers regarding the way Mr. Foster's Taft case was progressing in the courts in California, sir?

A. I read what was in the Insider Newsletter and also in the trade journals, yes, sir.

Q. As best you can recall, state in substance what developments in Mr. Foster's case you read about.

A. Simply that Mr. Foster was about to sell or had started selling product outside of the hamlet of Taft, and the Coca-Cola Company got into a harassment with him and then some legal men came into the picture.

Q. And do you recall what happened at that stage?

A. What happened at what stage? When legal men came in?

Q. Yes, sir, when the legal men came in.

A. Well, I understand there were some lawsuits.

Q. Do you know what the lawsuit was about?

A. In essence, he was suing for a hundred eighty million dollars for damages or something. They stopped him on purchasing cans or restrained him.

Q. Did they stop him or did they just limit the number of cans, do you recall, sir?

A. My impression was they stopped him and then they started limiting him. They stopped and started up on a limited basis.

Q. Do you recall whether Mr. Foster or his bottling company requested any emergency or temporary or preliminary relief from the court in California?

A. No, I don't.

Q. And have you heard anybody discuss that, sir?

A. Subsequently I met Mr. Foster in Washington.

Q. Did he tell you about how his case was progressing?

A. Not really. There was some action that was coming up in court in a number of months, and that's the only recollection I have on the progress of the case.

Q. Did he tell you about some setbacks in the case?

A. Well, I don't know what you mean by setbacks.

Q. Did he tell you he had tried to force Coke to sell him as much product as he wanted?

A. I don't know whether he made the statement he tried to force Coke. I think he sought to have all the product he needed.

Q. Did he tell you the court refused to do that?

A. He said he hadn't gotten relief.

Q. Did he tell you he had tried?

A. I wasn't really interested.

Q. In describing the city of Taft, California, Mr. Alden, which I must confess I don't think I have ever been to, you have described it as a hamlet, which I presume means that it is in your opinion a very small area. Would you classify the city of Denver as a hamlet?

A. Oh, hardly. No, Denver is one of the top twenty prime trading areas in the country.

Q. Yes, sir. Other than the fact that in your opinion Mr. Foster's territory embraced a hamlet and your territory in your franchise embraces one of the twenty prime trading territories, do you know on this date any difference between your situation in the soft drink industry and Mr. Foster's situation out there at Taft?

A. Well, I have never given any thought to comparing them.

Q. Mr. Alden, when you acquired the Royal Crown Bottling Company of Denver, did that company own vending machines in which Royal Crown products were vended?

A. Yes.

Q. Were these on location where they were being used?

A. Some.

Q. Do you recall the approximate number of such vending machines which were in use?

A. Seventy-five or eighty.

Q. Do you know the approximate number of vending machines within your franchise, exclusive area, which are in use today?

A. Twenty-five or thirty.

Q. Do you recall the appproximate number of vending machines which were in use as of January 1, 1970?

A. No.

Q. Do you recall the approximate number of vending machines which were in use as of approximately January 1, 1971?

A. No.

Q. Do you recall the approximate number of vending machines which were in use as of January 1, 1972?

A. No.

Q. Do I conclude from that series of answers that you are not particularly interested in the vending machine business in the Denver area?

A. No, we have records in the office that I refer to when I seek a similar answer to a question.

Q. Did a time come when a large number of your vending machines was withdrawn from active use?

A. Not a large number at one time. Over a period of time we made placements, we took some back at a rate of—the picking them up was greater than the replacements.

Q. Yes, sir; that is obvious from the figures, but I want to know, for example, shortly after you took over the franchise, did you lose any accounts having more than two soft drink vending machines?

A. There was only one that we lost, and that was General Service Division of the Government, where we had, I believe, eight or ten machines.

Q. That is the State of Colorado?

A. No, that is the Federal Government.

Q. Yes, sir.

A. I believe they call themselves General Services.

Q. Yes, sir.

A. And they were unhappy with the problem on returnable glass, and also we were consistently having competitive pressures from Pepsi-Cola and Coca-Cola on putting in their vendors and having ours displaced.

Q. Mr. Alden, do you know the quanity, approximate quanity of Royal Crown products that Royal Crown Bottling Company delivered in the Denver area during calendar 1968?

A. Approximately—the figures are all in black and white, and when I want to refer to them I can get them. I would figure roughly three hundred thousand.

Q. Three hundred thousand what, sir?

A. Cases.

Q. Now, this would have been primarily Royal Crown Cola and Diet-Rite?

A. And Ne-Hi and Party-Pak, which they discontinued.

Q. Well, let me just back up for a minute, Mr. Alden. Of the three hundred thousand cases of Royal Crown products that were handled by Royal Crown Company of Denver in calendar 1968, could you give us an estimate, as best you can, of what percentage of that would have been R. C. Cola and Diet-Rite combined? It is 80, 90, 65, 95, what?

A. That would have been close to a 55–45 relationship.

Q. In other words, about 55 per cent of the three hundrd thousand would have been R. C. Cola?

A. No, because you have to deduct from there the Party-Pak and the Ne-Hi items. But the relationship of the balance would be a relationship of about 55 to 45 per cent.

Q. All right. Well, what I want to know is, of the balance, the Cola plus the Diet-Rite, what percentage of those two, of the total for calendar 1968?

A. 95 per cent. I'd say.

Q. Now, do you recall in 1968 whether that was primarily returnable or nonreturnable, returnable glass, can, or what?

A. It was practically all returnable glass.

Q. What was the situation in 1968, to the best of your knowledge, calendar 1968? Did substantially all of his product ultimately go to retail outlets in the ten-county Denver franchise area, sir?

A. They were servicing about 25 percent of the retail outlets in the ten-county area off their route sales and a couple of distributors.

Q. But to your knowledge, did any substantial portion of that three hundred thousand cases find its way to retail outlets outside of the ten-county area?

A. Not to my knowledge, I wouldn't know.

Q. All right, sir. For calendar 1969, Mr. Alden, could you tell us the approximate number of cases of Royal Crown products handled by Royal Crown Bottling Company of Denver?

A. No, I don't have the exact figures.

Q. Could you give us the approximate figure?

A. I wouldn't even give you the approximate, because I don't want to be inaccurate.

Q. Well, Mr. Alden, I am asking you for your best information. You are the President of the company.

A. But I have a lot of figures to carry, which I usually keep in my files and refer to them.

Q. Well, do you have those files with you?

A. No, I don't.

Q. Do you recall whether in calendar 1969 the number of cases was larger or smaller than the estimate?

A. On Royal Crown and Diet-Rite?

Q. Yes, sir.

A. The figures were less. All of the figures were reported monthly to Royal Crown in Columbus, Georgia, so they had every figure for every month and every year. You may have copies of them.

Q. Have you discussed those 1969 sales figures with anyone in the last couple of weeks, Mr. Alden?

A. I don't recall.

Q. Did anyone ask you about them?

A. No.

Q. Mr. Alden, I am just asking you for your best estimate of the total number of cases of Royal Crown products handled during your first year as president in calendar 1969.

A. I don't recall. We had a very devastating period in the last quarter because of the cyclamates, which knocked us out of the Diet-Rite business.

Q. Excuse me, Mr. Alden. I'm not asking you for explanations or excuses.

A. I can identify figures as being correct, but I do not recall the figures for each year.

Q. Well, let's take another way. Do you recall for calendar 1971 approximately how many cases of Royal Crown products——

A. I don't know.

Q. You have no idea?

A. No.

Q. Mr. Alden, you told us you were the marketing expert and that you were very interested in the Denver market.

A. I'm the marketing specialist.

Q. And yet, you tell me you don't know anything about the routes, you don't know how much product you are selling, you can't remember the prices. What have you been doing? Why can't you tell us these figures? Why are you trying to keep this information from the Court?

Mr. Brega. Just a moment. Let's get one thing straight. Don't start badgering my witness or we'll leave.

Mr. Wallace. I am not trying to badger your witness.

Mr. Brega. If he says he doesn't know, then he doesn't know. You can ask him a proper question, but don't badger the witness.

Mr. Wallace. I want his best estimate.

Mr. Alden. I have some figures here which were taken from some records, and I will read them to you and see if they sound like they are in the right ball park for you. And if later on you discover that they are not accurate, we would appreciate your so advising us. I am advised that some of the records indicate

that during calendar 1968—and you might want to jot these figures down if it would help you visualize what we're talking about—I'm advised that during calendar 1968 the total bottle-case sales were 281,075.

A. Royal Crown and Diet-Rite?

Q. Total Royal Crown products, which I think you estimated would be around 90 percent Diet-Rite and Royal Crown—

A. A 300,000 figure.

Q. Yes, I think that's what you said earlier. And also I am advised that canned case sales for that calendar year were 44,049. I am advised that calendar 1969 bottle-case sales were—it's my understanding that these are so-called standard cases. Does that term make sense to you?

A. Yes.

Q. I'm advised that the 1969 bottle-case sales were 199,225; canned-case sales, 35,151. Do those figures seem right?

A. I would accept them as being what you call a ball park area.

Q. For 1969, Mr. Alden, would you estimate again for us the approximate percentage of that which would be Royal Crown Cola and Diet-Rite combined?

A. Between 90 and 95 percent.

Q. And would the breakdown between the Diet-Rite and the Cola be 95 percent cola—

A. No, because we had the cyclamate situation that developed and we went out of business on Diet-Rite for a period of time. Then we fought like hell to get back in the business after we got supplies. So the relationship changed a lot in that last quarter.

Q. In view of that cyclamate problem, could you give us an estimate of the breakdown between Royal Crown Cola and the Diet-Rite for the year, just approximately?

Q. Haven't you got those figures?

A. No, sir, I don't have them in front of me.

A. I really can't, because this intergration was such that in retrospect I would merely be taking wild stabs, and I would rather not. I have the figures.

Q. For calendar 1970, Mr. Alden—you might want to jot these figures down and see if they look approximately right—bottled cases were 184,587; canned-case sales were 1,711. Do those seem like they're in the ball park?

A. I would say they are, yes.

Q. For calendar 1971, I have bottle-case sales of 128,103 and canned-case sales of 81,479. Do those look like they're reasonably within the ball park?

A. In total cases, yes. In breakdown, I'm not sure.

Q. During calendar 1969, Mr. Alden, are you aware of any substantial portion of those cases which ultimately reached retail outlets outside your ten-county exclusive area?

A. In '69, I don't remember.

Q. Do you have any reason to believe any of them went outside the area?

A. In the time area between the end of 1969 and the early part of 1970, we do have reason to believe that some of the cans did go outside the area, because I forget the date. We have that on record. We sold Del Farm, their warehouse over here on—I think it's Brighton Boulevard. They made pickups at our plant for their warehouse, and they do have stores in Fort Collins and Cheyenne, Colorado Springs, as well as metro Denver.

Q. Mr. Alden, during calendar 1970, did you give us an estimate of approximately what percentage if any of those case sales ultimately wound up in retail outlets outside your ten-county franchise area?

A. We didn't exercise dominion over our product when we sold it to a warehouse or distributor in this market.

Q. I want your best estimate, Mr. Alden.

A. I couldn't, because we didn't make any studies on it.

Q. Would it have been a substantial number of cases?

A. I don't know, because chain warehouses might have shipped all of it into some outside point instead of balancing it off with all their stores, or they might have kept it all in this market.

Q. Let's put it another way, Mr. Alden. Out of those case sales for calendar 1970, approximately what percentage was handled by your route salesmen and distributors?

A. Of Royal Crown and Diet-Rite products?

Q. No, sir. Of the Royal Crown sales figures that we have, which are the best figures that we have.

A. In 1969?

Q. Yes, sir; 1969.
A. I would say 95 percent of it went into route sales, into vending machines.
Q. Now, for 1970 what percentage would you say went into route sales?
A. Well, in the time period between 1969 and 1970, we also had been asked to provide non-returnable for warehouses, and I would have to refer to my records to come up with a true picture.
Q. Do you deliver here in the Denver area?
A. They pick up.
Q. Which warehouses pickup?
A. Associated Grocers. You're speaking strictly of Royal Crown and Diet-Rite?
Q. Royal Crown products, yes, sir.
A. Royal Crown Bottling Company products?
Q. No, sir. Royal Crown of Columbus products.
A. The franchise brands, the licensed brands we are working on?
Q. Yes, sir.
A. We sold AG and we sold Del Farm. They both picked up.
Q. Are there AG stores in your ten-county area?
A. Oh, lots of them, the bulk of them.
Q. Do you recall approximately how many cases AG bought in 1969?
A. I don't recall the figure but the figures were small.
Q. Now, does Del Farm have any stores in your ten-county franchise area?
A. Yes. This is their prime trading area.
Q. Approximately how many stores do they have?
A. Some 20 odds stores. They have been closing quite a few. I think the score is now about 24.
Q. Now, did they constitute a large percentage of your output in 1969 or '70?
A. Oh, no.
Q. Was that very small?
A. Very small.
Q. Mr. Alden, as I recall, you said that your bottling line at the plant which you purchased from the Domenicos is still in operation?
A. Oh, yes.
Q. Do you know approximately what the capacity of that bottling line is?
A. When we made the purchase we naturally wanted to get some figures to rely on, and we were told that on a two-shift basis, we could approximate a million cases a year on returnables.
Q. Mr. Alden, for calendar 1971 do you know approximately what your volume of Buffalo Bill's Sarsaparilla was in terms of cases?
A. That's not a licensed brand of Royal Crown.
Q. As I understood, it was another product—and correct me if I'm wrong—is this a product you bottled on the bottling line at Royal Crown?
A. Yes, that's bottled there, but it's not a Royal Crown product. We have been talking about Royal Crown products. Now your question is—
Q. Approximately what volume?
A. Buffalo Bill's Sarsaparilla has recently been introduced. So we are just about starting to fill the pipeline. A few thousand cases have gone into California and a few thousand cases into this area.
Q. Would you say 10,000 cases a year?
A. Well, it's only been out a few months. So the going rate would be over 10,000 cases.
Q. Around 10,000 a year at the present rate?
A. Yes.
Q. Do you know the approximate rate of production of Baron's Apple Beer?
A. Well, that's about double that.
Q. Around 20,000 cases a year?
A. Yes, sir.
Q. Is it Whyte's Birch Beer?
A. Whyte's Ginger Beer.
Q. Do you know the approximate volume on that?
A. We haven't any history on it yet. We have just introduced it about four weeks ago.
Q. How about on your Birch Beer and Old Dutch Beer?
A. Yes. We have no history on it, although the great interest on that seems to be in the eastern part of the United States than the western part.
Q. Any other products that you bottle on your production facilities at Royal Crown Bottling Company?
A. You mean on our facilities in the Royal Crown plant?

Q. Yes.
A. Yes. We have Mug Root Beer.
Q. Any others, sir?
A. Ne-Hi products.
Q. Any others, sir?
A. We had bottled Gatoraid Citrus and Gatoraid Cola. Royal Crown notified us that as of the first of September their franchise agreement with Stokley was out so that—
Q. So that product is expiring, is that correct?
A. It is discontinued, right.
Q. Any others, sir?
A. That's all that's on a scheduled bottling basis.
Q. Do you know approximately, say, for calendar 1971 what your monthly rate of production was for Mug Root Beer?
A. Well, I wouldn't know what the production rate was monthly for Mug Root Beer.
Q. For the year?
A. Well, related to sales, I would say it was probably, glass and cans, about 125,000 cases.
Q. You don't do the cans though, do you?
A. We do our own customer canning. In other words, we have canning rights as we had with Royal Crown.
Q. But I mean you don't do the canning?
A. We don't have the canning facilities.
Q. You don't do the canning at the building?
A. We don't can. We don't have canning facilities. But we are a master canner in the terminology of the trade, so that we have our products canned wherever we like to use the canning facility on a custom basis, paying them a rate of so much per case production time.
Q. About how many cases of Mug Root Beer are sold per year by your company?
A. About 125,000.
Q. Of that, approximately how many are in bottles?
A. All of the items that are non-returnable packages and the non-returnable bottles in 1971 is roughly 50 percent, 45 percent.
Q. So around 50,000 bottles per year of Mug Root Beer?
A. I believe that's correct.
Q. Now, incidentally, Mr. Alden, this bottling line bottles either returnables or non-returnable bottles?
A. Yes.
Q. Now, is your estimate of a million cases a year—
A. That was based on returnable bottles.
Q. Does that operate faster or slower for non-returnables?
A. The non-returnables are slower because the speed of the machinery is determined by the speed of the labeling machines. And the labeling machine we have now is much slower than the filling line.
Q. Now, what would be the speed of this machine or this bottling line if it were operated on non-returnables, how many cases per year?
A. Possibly half.
Q. Are your Ne-Hi products a substantial quantity of goods?
A. They never were.
Q. Are you presently operating your bottling line on one shift or two shifts?
A. One shift.
Q. How many days a week?
A. Five.
Q. Do you do any bottling for anybody else on that bottling line on a regular basis?
A. No.
Q. Mr. Alden, when did you first become aware that Royal Crown products were going outside your ten-county exclusive area?
A. When we first sold the warehouse.
Q. When was that, sir?
A. I believe the latter part of '69.
Q. When were you first aware that Royal Crown products were being sold to warehouses which in turn—such as your warehouses you named out in Cali-

fornia—which were in turn selling them all outside of your ten-county franchise area?

A. Well. Generla Beverage had the orders. I typed them up at the end of 1971.

Q. Mr Alden, were some of the Royal Crown trademark products which are handled by your company put under the label, packaged, or distributed by Interstate Beverage Company?

A. Not that I know of.

Q. Does the box they go in or the case they go in say "Interstate"?

A. No. All the glass goes out in shells that are marked "Royal Crown Cola," "Diet-Rite," or Ne-Hi." Most of them are "Royal Crown Cola."

Q. How about the cans?

A. The cans go in trays that feature—we may have had some trays at Mountain States, because the Royal Crown people indicated possibly it would be well to mention the distributor. I think we probably did have "Distributed By"—I am not sure. We of course do on Mug and other items, on our specialty items, not the Royal Crown items. And all of the can items, of course, that we have been buying from the other Royal Crown canner in town say "Distributed By Royal Crown Company, Columbus, Georgia."

Q. Mr. Alden, could you state for the record what your estimated needs are of canned and bottled products, say, for September of 1971?

A. What they estimated for '71? '71 is gone.

Q. Thank you—I'm sorry. I'm glad you corrected me. September of '72.

A. Between thirty-five and forty thousand cases.

Q. Thirty-five to what, sir?

A. Forty thousand cases.

Q. This is of cans?

A. This is of cans.

Q. Now, how about bottled products, sir?

A. The glass we can't project as firmly, because it depends on how many salesmen we have, on the returnable glass.

Q. Well, sir, but what is your best estimate?

A. Twenty, twenty-five thousand.

Q. All right. Could you give us your best estimate for October of 1972, for cans?

A. Approximately the same.

Q. How about November of 1972, Mr. Alden?

A. Approximately the same.

Q. December of 1972?

A. Approximately the same.

Q. January of '73?

A. I haven't projected anything for 1973.

Q. Mr. Alden, as you recall, I believe it was before lunch you testified about major customers of General Beverage for Royal Crown, Diet-Rite?

A. All items that were available.

Q. Yes, sir. And I believe you identified the following companies: Certified Grovers, A. M. Lewis, Small and Final, Stater Brothers, Safeway, Alpha Beta, Vaughn's, and you thought there might be one other. Now, just to sort of shorten my questions, I will refer to these as the California customers, if that's all right with you. Now, my question is, going back to your estimates for September, October, November and December of 1972, of your requirements, if we don't count the California customers that have been identified, if you don't count them—let's separate them out for a moment—what would you estimate your needs would be for September of 1972?

A. Between eight to ten thousand cases a month.

Q. Eight to ten thousand cases of cans?

A. (The witness nodded affirmatively.)

Q. And glass?

A. Again, that is a variable, depending upon whether we have twelve drivers, ten drivers, eight drivers.

Q. The glass, you still would say, would be twenty to twenty-five thousand, depending upon the—

A. I would say that would be the area.

Q. Would the same be true of October, November, December?

A. Yes, I would say each of those months.

Q. Mr. Alden, just catching up on a couple other things, I believe at some point in your testimony earlier you referred to a Mountain States Wholesale Grocers?

A. I never mentioned that.

Q. Perhaps I misunderstood you. Did you mention something that sounded like that, or do you know of such a company?

A. Mountain States Wholesale—certainly I know of that company, but I never mentioned them. The only mention of anything about Mountain was this canning company over here in town.

Q. Which is called what, sir?

A. Mountain States Canning.

Q. I see. But there is a Mountain States Wholesalers or Mountain States Wholesale Company?

A. There is a wholesale house in Idaho called Mountain States.

Q. And have you, in any of your various ventures, had any dealings with Mountain States Wholesale?

A. General Beverage has shipped a partial order there, maybe the second one. I remember that, that situation, because the Salt Lake bottler shipped cans in, sold them at a lower price, and we said we weren't interested at General Beverage.

Q. This was the Salt Lake bottler that shipped to Mountain States?

A. Salt Lake bottler of Royal Crown had made an offering at a substantially lower price.

Q. Mr. Alden, are you represented by any lawyers or law firms besides Mr. Brega and his firm here in Denver?

A. Here in Denver? No.

Q. Are you represented by any law firms in any other cities of the United States?

A. Not actively.

Q. Then on an inactive basis?

A. There are law firms—there are legal men I am familiar with around the country, if there are any problems that should arise.

Q. Let me put it another way. In connection with your soft drink interest or——

A. At the moment our sole counsel is Hindry and Meyer.

Q. Do you recall ever telling anybody that you were also represented by Mr. Foster's lawyer?

A. No.

Q. Is your answer no, sir?

A. No.

Q. Do you recall telling anybody that you had a lawyer in Columbus, Georgia?

A. I believe in privileged conversation with my counsel. Is that privileged?

Q. Well, did you tell anybody other than your counsel that you had a lawyer in Columbus, Georgia?

A. No, I didn't tell anybody I had any lawyer any place, although I did say that I did have a friend who was down in Columbus, who was a lawyer.

Q. Do you recall ever telling anybody you had a lawyer in Washington?

A. Oh, I had some conversation with Mr. Feld, who was asking me whether or not I was going to sue.

Q. Do you recall what you told Mr. Feld?

A. No, but I recall what he told me.

Q. What was that, sir?

A. In essence, that there was nothing that they could do about General Beverage shipping Royal Crown licensed products anywhere in the United States.

Q. Does Mr. Feld's son-in-law work for you?

A. Son-in-law?

Q. Brother-in-law?

A. No. He had recommended—we had asked the Royal Crown people ever since January, 1969, to give us help on specialists on production, on specialists on route sales. We never got any help. And Mr. Feld said that he knew of a very competent man who was with Pepsi-Cola in San Diego; he was well-qualified to be manager of route sales. We said we were very much interested.

And he said, "And incidentally, he is my brother-in-law."

And I said, "Well, he will stand or fall on his own merits. But if you recommend him highly for this picture, we are bound to accept it, because your interests in the Royal Crown brands are as great as ours." So, sight unseen, we did hire this man.

Q. Is he no longer employed by you?
A. He was fired.
Q. When was that, sir?
A. I don't remember the date. I think his period of employment was about three months. He was not qualified to be a route manager, was not qualified to be a supervisor, and then asked if he could have just one route, and we agreed to do that and still maintained his salary, feeling that with his touted experience as a Pepsi-Cola man, he could do a hell of a job for us. But he didn't.
Q. Mr. Alden, when did you first come in contact with lawyers for the Federal Trade Commission or the F.T.C.?
A. When?
Q. Yes sir.
A. Well, when I was invited to present a point of view on the marketing of soft drinks, I got to Washington and I met Mr. Wilson in Senator Hart's office and several other gentlemen, five or six or seven.
Q. Had you ever talked to anybody on the telephone from the Federal Trade Commission?
A. Prior to going to Washington?
Q. Yes, sir.
A. No.
Q. Had anybody from the Federal Trade Commission ever visited you here in Denver or at any other place?
A. No.
Q. Did you meet with the lawyers for the F.T.C. while you were out in Washington?
A. I don't know what you characterize as a meeting, and the lawyers of the F.T.C. I met Mr. Wilson.
Q. Yes, sir.
A. And several other young gentlemen, whom I don't know whether they were with the F.T.C. or with Senator Hart's office. I met some woman—I think she was the press secretary or something. There were a lot of people milling in and out of the office.
Q. Whose office was this, sir?
A. I believe it was Senator Hart's office.
Q. I see. Did you ever go over to the F.T.C.?
A. I don't know where the building is. I have never been there.
Q. Since that day that you have just referred to, have you ever met with anybody from the F.T.C.?
A. No.
Q. Have you ever talked to them on the telephone?
A. I had one call from the F.T.C. asking me for some market research data I had.
Q. Do you recall who that was from the F.T.C., sir?
A. Yes, it was Mr. Wilson.
Q. Do you recall approximately how long the phone conversation lasted?
A. Five minutes, seven minutes. I didn't keep time. He was paying for the bill.
Q. Do you recall what all was said after the request for the market research data was made?
A. Do I recall what, sir?
Q. What else was said in addition to the request for market research data.
A. That basically was the material he asked if I'd send him.
Q. Did he ask you if you were going to bring a lawsuit?
A. No.
Q. Did you tell him you were going to bring a lawsuit?
A. Well, I told him when I was in Washington I had been notified by my office that we had been shut off on cans, and when I talked to him I told him we were not going to accept that, because we thought it was a violation of the antitrust and monopoly laws, and we were going to take what necessary steps we could take to protect our position.
Q. Do you recall what Mr. Wilson said?
A. It wasn't a very significant remark. I don't recall whether he said "Oh," or "Good luck," or something.
Q. Did you tell Mr. Taft you were thinking about bringing an action?
A. I don't know Mr. Taft. Do you mean Mr. Taft in Cincinnati?

Q. I meant Mr. Foster.

A. No, I haven't talked to him.

Q. Have you talked to any other bottlers, either Royal Crown or otherwise, about bringing this lawsuit, sir?

A. No. No, I did tell Mr Feld, who was the area manager, that we needed relief, that we had irreparable and immediate damage occurring all over the place. Other than that, I didn't discuss it with anybody.

Q. Mr. Alden, have you ever seen an annual report for Royal Crown Cola Company, the defendant in this action?

A. A report, financial?

Q. An annual report to stockholders.

A. I have seen digests in the trade journals, or in the Wall Street Journal. I have never seen the formal report.

Q. In your opinion, are they a financially sound company?

A. Financially sound?

Q. Yes, sir.

A. They have been making some interesting acquisitions. Other than that——

Q. Let's put it another way. Do you have any reason to believe they are financially unsound?

A. No.

Q. Mr. Alden, I noted in your Complaint filed in this case, you said your damages were one millon dollars?

A. Estimated at no more than one million.

Q. Yes, sir. Could you tell us how you arrived at that figure?

A. Yes. We had very serious deterioration of our sales pattern, what we have. We lost shelf space on our cans. We were irritating and upsetting the food trade, who don't like to see empty spots, and finally it was covered up by competitors. It affected their attitude toward us on other products that were being delivered by the routes, which we have on the routes to try and give the salesmen as much earnings as they can get.

We had people complaining because the vendors were out of cans. We had to pull some machines back. We had about three men, as I recall—three men or four men may have quit. Three or four—they did quit, but I don't know whether it was three or four. Mr. Hunt was staying on top of that. And the rest of the route salesmen were talking about qutting because they had lost income, and we had to set up a subsidy program which was based on their sales that they would have had if they had had the cans to sell.

Q. Would you explain a little more fully why you didn't save the pieces of paper where your arithmetic was performed?

A. Because I finalized it in a note, and I have the note some place.

Q. Where is the note?

A. It might be in my office.

Q. Do you recall the date on which you finalized it in a note?

A. A couple of Sundays ago.

Q. Did you finalize it in a note before or after you talked to your lawyers about bringing this lawsuit?

A. Both.

Q. Now, how about the pieces of paper that you used for your study, that went into the wastebasket? Were they generated before or after you talked to your lawyers about bringing this lawsuit?

A. Those were before. We were trying to analyze how seriously we had been hurt, and in what areas.

Q. When you went to your lawyers to talk to them about this lawsuit, did you tell them you had this handwritten study on paper?

A. No, but when they asked me if I had it, I provided some figures.

Q. Did you provide them with the pieces of paper that eventually went in the wastebasket?

A. No, hardly. They went in the wastebasket.

Q. Did you tell them you had these other figures on paper?

A. I told them I had thoughts.

Q. Did you tell them you had thoughts on paper?

A. They didn't ask me.

Q. Did they tell you to do anything with any pieces of paper where you had these studies on them?

A. No.

Q. Any reason for not preserving these pieces of paper, Mr. Alden? I am talking about the pieces of paper where your study was written out prior to talking to your lawyers.

A. No. They served no purpose. I was merely analyzing how serious the matter was in terms of damages and trying to reach some conclusion. I was aware of the fact that the Taft bottler had a hundred eighty million dollar suit, instead of making sense in terms of its magnitude, because he was smaller; I tried to be as rational, as reasonable, as good a businessman as I could about it.

Q. Why did you think your written study prior to seeing your lawyers would not have had any value?

A. This was independent of anything the lawyers were involved on.

Q. That is why I want to know why you thought it wouldn't have any value.

A. I write lots of little notes on paper and throw the scratch pads away. I do that at home, in my office, and it's a work habit of mine.

Q. What you call the finalized note, which is the note you created after you saw your lawyers in connection with this lawsuit—would you describe for me how many pages that note is?

A. That may not even have been a note. I don't recall whether I gave—if it was anything, it might have been a single sheet of paper, or nothing but conversation. It might have been a telephone conversation.

Q. Now, did you give the note to Mr. Brega?

A. No.

Q. Did you keep it at home?

A. I don't recall.

Q. In your note, did you have some figures which were added up?

A. Well, in the net, I estimated the value of this company to be around a million dollars, and where the damage has occurred I felt that the damages would be not exceeding a million dollars.

Q. Why do you estimate the value of your company now as a million dollars when you paid $658,000 for it?

A. It's had growth.

Q. The number of route salesmen has grown?

A. Well, route salesmen is just one area of selling soft drinks. Vending machines are another area. Distributors are another area. Warehouse is another area.

Q. Has it grown in the area of vending machines?

A. You have the figures which have indicated not.

Q. Well, that's why I'm puzzled.

A. No. I said there are areas of sales development and I named the areas. We have not had growth in vending machines, and to my knowledge, vending machines are not very profitable areas for anybody.

Q. That's what I asked you. I asked you why you considered your business to have increased in value from 658,000 to a million, and you answered, as one of the reasons, the vending machines, and I am puzzled.

A. No, I guess you misunderstood me.

Q. Mr. Alden, I also recall from the figures we went over a little earlier that in 1968 your bottled-case sales were close to 300,000.

A. Not mine. They were the predecessor's operation.

Q. Yes. And then in 1969 they were just a shade under 200,000, and yet for calendar '71, it was 128,000. Now I take it——

A. On the Royal Crown items.

Q. Yes, sir; Royal Crown items. Now, I take it that the growth you are talking about is not in bottles of Royal Crown's items?

A. That would be a sound conclusion.

Q. In fact, in terms of total Royal Crown products, both cases and bottles, the figures to date, do they not—and I see you have written them down—comparing calendar '71 with either '68 or '69, the latter figures are lower, is that correct?

A. They have followed the trend of the previous four years, except the rate of decrease has been deaccelerated.

Q. So when you talk about growth of your company, you are not talking about growth in connection with Royal Crown products at all, are you?

A. I'm talking about the Royal Crown Bottling Company.

Q. In other words, it's the growth in the Buffalo Bill products and the root beer and so forth, is that correct?

A. The growth in total sales?

Q. Yes. I am searching to find the difference between $658,000 and $1 million.

A. I don't know your formula, but you search.

Q. I don't know the formula either, but you are the one who came up with the total, and I am trying to find the formula. But I think what you're saying is that the growth is in areas other than Royal Crown products, is that correct?
A. No. What I'm saying is that our value of the company is $1 million.
Q. Then, Mr. Alden, has the Royal Crown Cola Co., defendant in this case, done anything which has interfered with your Buffalo Bill sales?
A. Not that I know of. They would have no jurisdiction.
Q. Have they done any thing that would interfere with your Baron's Apple Beer sales?
A. Not that I know of.
Q. Have they done anything that would interfere with your Old Dutch Birch Beer sales?
A. Not that I know of.
Q. Ginger Beer sales?
A. Not that I know of.
Q. Or any of the other products that we talked about?
A. Specialty items, not that I know of.
Q. Mr. Alden, since you purchased Royal Crown Bottling Co., have you purchased any new route trucks?
A. No.
Q. Have you purchased any new production equipment, anything substantial?
A. Some.
Q. What is the most substantial purchase you have made?
A. Well, in the area of purchases, it would include leasehold, a sugar tank. We put in a new inside on a sugar tank.
Q. How much would the sugar tank inside cost, please?
A. I believe, as I recall, $1,200.
Q. Any other substantial capital improvements, Mr. Alden?
A. Not capital investments, except in supplies, glass, packaging supplies, shelves.
Q. The gentlemen who are the Wall Street financiers, Mr. Miller, Mr. Devlin and Mr. Geiger, would you describe whether Mr. Miller or Mr. Devlin or both of them are operating on behalf of somebody else?
A. No, they're not.
Q. To the best of your knowledge, do you know if they have any options or if anybody else has any options to purchase your business or to purchase their interest?
A. I have no such knowledge.
Q. Does anyone have any option to purchase your interest in the various companies?
A. I have no such knowledge.
Q. Now, how about with respect to Mr. Geiger, would your answer be the same?
A. Same circumstances.
Q. Do you know which clients Mr. Geiger represents? I believe you said he was an investment banker or broker of some sort.
A. I can't recall accurately the number of corporations he is a director of, but I understood it was somewhere in the neighborhood of 20, 30 or 40, quite substantial.
Q. Do you know any soft drink or other food companies, manufacturer or distributor, which he is affiliated with in any way?
A I don't know of any.
Q. Do you know of any food manufacturer or distribution companies that either Mr. Miller or Mr. Devlin are associated with?
A. No.
Q. In connection with the operation of the various enterprises, do you have any policy on how long documents are retained in your file?
A. Are you speaking of Royal Crown Cola Company?
Q. Royal Crown Bottling Company.
A. No.
Q. How long are they generally retained?
A. I believe the old rule of thumb, while they're needed for tax purposes, and then after that, destroy them.
Q. Have you destroyed or caused to destroy or do you know of the destruction of any documents in the last two months?
A. None that I know of.

Q. Have your attorneys instructed you to refrain from destruction of documents while this lawsuit is pending?

A. I haven't discussed it.

Q. Have they suggested——

Mr. Brega: Let me enlighten counsel from Washington, Colorado people don't destroy documents. That may be an eastern practice, but we don't engage in it out here.

Mr. Wallace: Well. Mr. Brega, I think maybe you didn't hear your witness' last answer. He said he had a rule of thumb to throw documents away when they weren't needed for tax purposes. Now——

A. Oh, records? Well, for tax purposes, usually they go back four years. In other words, we don't have anything that I know of that's older than four years. Maybe we do. There's a lot of stuff up in the attic, but nothing has been destroyed that I can recall since I've been there.

Q. (By Mr. Wallace). Now, my question to you—and I am not meaning in any way to criticize or attribute bad motives to you—but a lot of people have a rule of thumb that they throw documents away when they are involved in litigation. And I was just inquiring whether you had.

A. Nothing has been destroyed or thrown away.

Q. Thank you, sir. You mentioned that your firm, around the period 1952 to 1959, was located in Flushing, Long Island.

A. No. I believe I said from about '55 or '56 to '59.

Q. Do you recall the name of the street on which that was located?

A. No.

Q. Do you recall the name of the building?

A. No.

Q. Do you recall whether you were the only occupant of the building or whether there were other occupants?

A. No. It was a warehouse.

Q. Whose warehouse was it?

A. A company called Coffee Instants.

Q. Were you in any way affiliated with that company, other than occupying space?

A. They were a client.

Q. Were you also a stockholder or owner or creditor of that company?

A. No.

Q. Can you explain briefly the nature of the business of Coffee Instants?

A. Production and sales of instant coffee.

Q. Can you explain generally the functions which you served in connection with that client, just on a very general basis?

A. My responsibility was sales development, to find ways to increase sales. either under store brands or any other brands.

Q. Sir, earlier in your testimony you referred to an organization or business referred to as Rainbow Distributing Company in Denver. What is the nature of their business?

A. They distribute soft drinks?

Q. What brands, sir?

A. I know of our products. I don't know what other products they now distribute. I seldom see the truck when it comes in, or I never see the truck when it comes in the back of the warehouse.

Q. Do they constitute a large portion of your output of products?

A. No.

Q. Do you know the area in which they distribute products?

A. Towards the foothills and into the high country.

Q. Could you put it in terms of counties and States?

A. No, I couldn't. It would be in the area going west, in the ten-county area going west.

Q. Mr. Alden, when you were considering the purchase of Royal Crown Bottling Company of Denver, were you aware that one of your obligations under the franchise license would be to service the retail outlets within that area?

A. We knew that the function of the bottler was to develop the sales of the brand as best as possible and, of course, retail accounts are very important.

Q. Mr. Alden, I have been informed that some times when you meet with people from Royal Crown you have a tape recorder, is that correct?

A. Well, not sometimes. On two occasions with Mr. Wolfe.

Q. Do you recall approximately what the dates were on these occasions with Mr. Wolfe?

A. Yes. One time was a luncheon meeting with Mr. Smith and Mr. Wolfe, and the other time was in the last week in June when Mr. Wolfe came to my office.

Q. That was a luncheon meeting before the June meeting?

A. Yes, that was in February of this year. It was the early part of the year.

Q. In about February of '72 you had lunch with Mr. Wolfe and Mr. Ed Smith?

A. They had flown in from Los Angeles in a private plane and asked me to have lunch.

Q. Did you make a tape recording of that conversation?

A. I did make taped notes.

Q. Did you advise them prior to that that you would be doing that?

A. I certainly did. As I walked in and shook hands with them, Mr. Smith said, "What do you have under your arm?" I said, "A tape recorder so we can accurately recall our conversation."

Q. Do you have a copy of the transcript of that recording?

A. I think there is a tape on it.

Q. Has it ever been transcribed?

A. No.

Q. Who has possession of the tape?

A. It's my property.

Q. Where is it physically today?

A. Probably at my home.

Q. Have you ever loaned the tape to anybody?

A. No.

Q. Have you ever lent it to your lawyers?

A. No.

Q. Was there ever a transcript made of it?

A. No.

Q. Have you ever made notes from it?

A. I did recap some of the comments.

Q. Did you recap them in writing?

A. That's the way I recapped them, yes.

Q. Do you have a copy of that recap?

A. I possibly do at home.

Q. Have you ever provided a copy of that to anyone?

A. No.

Q. To your lawyers?

A. No.

Q. Have you ever played the tape recording either in front of someone or over the telephone to someone?

A. My sales manager, Mr. Hunt.

Q. Anybody else?

A. No.

Q. Have you ever played it for your lawyer or for anybody else?

A. No.

Q. Mr. Alden, you said there was a second meeting with a tape recording.

A. That was in my office with Mr. Wolfe and Mr. Hitt.

Q. Now, where is that tape recording?

A. With the other tape recording.

Q. Has that one ever been transcribed?

A. No.

Q. Have you ever made a recap from that one?

A. I made some notes.

Q. Where are those notes?

A. Probably with my other notes.

Q. Have you ever shown them or loaned them to anyone?

A. No.

Q. Have you ever discussed them with anyone?

A. I may have with Mr. Feld. He was quite concerned about why he wasn't invited to the meeting, and I gave him a digest on it, which is a recap of notes.

Q. Have you ever played that tape recording to someone in person or over the telephone?

A. No.

Q. Mr. Alden, several times in your testimony today you spoke about notes which you make from time to time relating to income tax considerations, such

as expense accounts and calendars and so forth. Do you keep those all in one folder or in one file drawer at home or in the office?

A. I wouldn't say it's any better organized than most people.

Q. Are they mainly at home or mainly at your office?

A. Both.

Q. Does Royal Crown Bottling Company file Federal income tax?

A. Yes.

Q. Does Interstate Beverage Company file Federal income tax?

A. No, that is part of the Royal Crown tax return.

Q. There is one return for both companies?

A. Yes.

Q. Does General Beverage Company file a Federal income tax?

A. It will.

Q. Do you have copies of your returns for Royal Crown and Interstate for 1968 to the present?

A. I believe they are in the files.

Q. Down at the big building?

A. The big building.

Q. Mr. Alden, did Royal Crown Bottling Company make a profit in the calendar year 1969?

A. Yes, sir.

Q. Beg your pardon, sir?

A. Yes, sir.

Q. Do you recall how much profit that was, sir?

A. I think it was about twelve thousand.

Q. Did Royal Crown Bottling Company make a profit for calendar 1970?

A. Yes, sir.

Q. Beg your pardon?

A. Yes, sir.

Q. Do you recall approximately how much that was?

A. Somewhere—about twenty thousand.

Q. Did Royal Crown Bottling Company make a profit for calendar 1971?

A. Yes, sir.

Q. Do you recall approximately how much that was?

A. Thirty thousand.

Q. Was your salary from that company substantially the same for each of those three years, sir?

A. It was.

Q. Did Royal Crown Bottling Company make a profit for the first half of calendar '72?

A. Yes, sir.

Q. Do you recall approximately how much that was, sir?

A. I believe it was around thirty thousand.

Q. For the first half of '72?

A. Yes, sir.

Q. Did Royal Crown Bottling Company make a profit for the month of July, 1972?

A. There were some adjustments made on that. I haven't looked at that report since I have been back from Washington. There were some adjustments; there was a loss of around fourteen or fifteen thousand dollars, and there were adjustments being made, and I believe when the proper adjustment is made, the company will be close to a break-even point for that month.

Q. Let me see if I understand that. You are saying that there was an initial or preliminary statement indicating about a fourteen——

A. The accountant did his worksheets and it showed a $14,000.00 loss, in that area. And I questioned him on that, and then on restudy he found out there had been some important charges that were allocated in that month that shouldn't have been.

Q. Who was the accountant involved in that, sir?

A. Mr. Buchanan.

Q. How about August of 1972, sir?

A. We haven't gotten any figures yet on that.

Q. Are there any projections, sir, worksheets?

A. Projections on profits?

Q. Yes, sir.

A. No, because from August 10th on we didn't know where we were going.

Q. Do you recall the approximate dollar value of your gross sales for calendar 1969 for Royal Crown Bottling Company of Denver?

A. Well, as with the case sales, I am not sure I can recall with a positive degree of accuracy.

Q. Yes, sir; I understand.

A. Each successive year, it was higher than the Royal Crown sales were when we bought the company; '69 was larger than '68, and each year there was an increase, an increment.

Q. Do you recall what the sales were for calendar 1971?

A. They were approximating a million dollars.

Q. What were the approximate gross sales for the first six months of 1972, sir?

A. About three-quarters of a million.

Q. What were the approximate gross sales for the month of July, 1972, sir?

A. They were in excess of a hundred thousand.

Q. Were they in excess of a hundred fifty thousand, sir?

A. No.

Q. What were the approximate gross sales for the month of August, 1972, sir?

A. I haven't seen the final figures, but they should approximate about a hundred thousand.

Q. Do you recall the approximate sales for the month of July, 1971, sir?

A. No, I don't.

Q. Do you recall whether they were in excess of a hundred thousand dollars?

A. Well, in '71, June, July and August were very good months, but I don't recall the figures. I believe each of the three months were in excess of a hundred thousand.

Q. Were they in excess of a hundred fifty thousand?

A. I think one month approximated it.

Q. Do you recall what the sales were for July, August and September of 1971?

A. We were just talking about it.

Q. Now I am combining three months, July, August, and September of 1971.

A. Actually, three hundred and some odd thousand.

Q. A little over three hundred thousand, is that correct, sir?

A. I believe so.

Q. So for July, August and September of '71, you were averaging around a hundred thousand dollars per month?

A. Better.

Q. Do you have any sales figures on the first part of September of '72, sir?

A. There have only been a couple of working days—our route sales.

Q. I see.

A. We get those daily.

Q. I see. Which days?

A. That was Friday, Tuesday, and Wednesday.

Q. Do you know what the route sales were for Friday, September 1 of 1972?

A. I can't—I don't carry them in my mind. They were very minimal.

Q. Were they less than a thousand dollars?

A. They were less than seven hundred cases, which would be over a thousand.

Q. Do you recall the route sales for Tuesday, September 5?

A. About seven hundred cases.

Q. How about sales through Mountain States or General Beverage Company? Any of those in September, sir?

A. No orders. General Beverage has back-ordered, so we haven't been able to fill orders.

Q. But you are unable to tell us the aggregate of your sales thus far in September, with any——

A. Approximately what I gave you. We did sell some product to Safeway and we did sell—we shipped a truckload of product to Salt Lake City, but I don't know the total dollars.

Q. You are unable to tell us with any greater precision the sales for July, August and September of '71, other than it was somewhere around three hundred thousand?

A. Or better.

(Recess.)

Q. (By Mr. Wallace) Mr. Alden, have you heard of a company called Columbine?

A. Yes.

Q. Would you state for the record the full name of that company, please, as best as you know it?

A. I don't know the corporate name, but as best I know, it would be Columbine Beverage Company.

Q. Where are they located, please?

A. On Broadway near our plant, Denver.

Q. Do you have any ownership or credit relationship with them, sir?

A. Ownership or credit relationship?

Q. In other words, do you own any shares of their stock?

A. No. At one time shortly after we came here, Domenico said that Mr. Kennedy, who is the owner, wanted to talk to us about selling out to us. We were interested in the possibility of his canning facility. Nothing came of it. Since then there has been a change and Mr. Kennedy sold out to another group.

Q. Do you have any business dealings with Columbine?

A. We had some canning. They canned some products for us.

Q. Buffalo Bill or Old Dutch Ginger?

A. Mug.

Q. Any other products?

A. Old Dutch is Birch Beer.

Q. Any other products?

A. No.

Q. Have you had any Royal Crown products canned by Columbine?

A. No.

Q. Did you ever talk to them about having it canned?

A. No.

Q. Have you heard any rumors that Columbine has canned Royal Crown products?

A. No, I hadn't heard a thing about it yet.

Q. Have you heard any rumors or do you know for a fact whether Columbine is in possession of some Royal Crown canned products?

A. I have no such knowledge.

Q. Have you heard ay rumors to that effect?

A. I said I hadn't.

Q. Are you generally familiar with the way Pepsi Cola distribution is conducted in the Denver area?

A. Generally, yes. They havea large fleet of trucks.

Q. Let me ask you one very short question on that rather than getting into all the details. Are most Pepsi Cola sales in the form of returnable or non-returnable containers in the Denver area?

A. I don't know what the ratio is. They sell a lot of cans because they have a big canning facility. So naturally that canning facility is turning out cans to be productive, which means they're selling a fairly sizable——

Q. Well, I'm not asking you to speculate on what they're doing.

A. I have no knowledge of their figures.

Q. I'm asking your knowledge from your observation of the retail stores in the Denver area. Have you observed both returnable and non-returnable Pepsi-Cola on the shelves?

A. Yes.

Q. Would you say that the returnable containers of Pepsi occupy in the neighborhood of 50 or more percent of the shelf space?

A. Yes, sir.

Q. Would the same be true of Coca-Cola?

A. Possibly.

Mr. Wallace. Mr. Alden, in connection with the hearing on a motion for preliminary injunction tomorrow morning, the defendant Royal Crown Cola would request that you provide certain documents and materials for inspection and copying prior to that hearing tomorrow morning, preferably around 8:30 in the morning. And here are the materials we are interested in. Perhaps you could jot them down and then we can discuss them. The first item is, I believe, what you call the shareholders' agreement among you and the other shareholders of Interstate Beverage Company. The second item is the written program or programs or studies or any such materials which you made in connection

with your appraisal or your survey of the Denver market. And I believe you said that at least one of such programs or studies was shown to Mr. Miller at one point. The third item is the documents relating to the transfer of Royal Crown Cola Co. in December of 1968, the documents relating to the transfer of shares of stock of Royal Crown Cola Co. to Interstate Beverage Company in December of 1968, and that would——

A. You're intermingling these names. You mean Royal Crown Cola Co. or Bottle?

Mr. WALLACE. I'm sorry. Thank you for correcting me. I mean Royal Crown Bottling Company of Denver. And included in that general category of documents would be such things as options, bills of sale, escrow agreements and things of that sort, employment agreements with any former employees. The fourth item which we would be interested in would be the category of documents constituting correspondence leading up to and relating to that transfer, correspondence between you and anybody with defendant Royal Crown Cola Co.

A. I'm not so sure I can get my hands on all of that by tomorrow morning.

Mr. WALLACE. Why don't we go through the list and then we can discuss what can be obtained.

We would be interested in this category of documents, correspondence with Royal Crown Cola, the defendant in this action, or with the Domenico family.

A. We had no correspondence with Royal Crown Cola outside of a letter to Mr. Uzzell.

Mr. WALLACE. We would be interested in a copy of that if you have it, sir.

The fifth category of documents would be your calendars which you referred to, and I believe you said you have your 1971 and '72 pocket calendars, and you are not sure about whether you still retained your earlier calendar, but we would like as many of your calendars as are available for 1968 to the present.

The sixth category of documents we would like would be the notes or scraps of paper which we described as being in your income tax files.

The seventh category of documents would be the federal income tax returns for, I believe you said, Royal Crown and Interstate, filed jointly, for 1968, '69, '70, '71, and any that may have been filed in '72.

And the eighth category of documents would be what you call the finalized note relating to your estimated damages and any of the pieces of paper which you said you worked this out on, if you still have possession of those.

The ninth category of documents would be the monthly financial statements of profit and loss, assets sales for Royal Crown Bottling Co. from 1968, each of the months in 1968 to the date of the last one.

The tenth category of materials would be the two tape recordings which you referred to earlier. And we would appreciate, since we are not sure that our tape recorder would be compatible with yours, if you can bring along your tape machine.

Could we have an undertaking from you to produce those materials for us at 8:30 in the morning?

Mr. BREGA. Let me interrupt here. I don't think it is Mr. Alden's position to agree or disagree to that. You obviously recognize that you are not complying with the rules in this regard. And I am not going to agree to produce any of these items at this time. We may or may not have some of these things available. But I don't intend to spend the night complying with a voluntary request of yours. So the record should properly reflect that.

Mr. WALLACE. Mr. Brega, I don't know that you meant it in the way it sounded, but there is no attempt on our side not to comply with the Rules. Now, you asked the Court for emergency relief, and we have been working diligently for the last few days to accommodate both you and the Court in presenting to the Court on the emergency basis the appropriate presentation. For that reason, in order to live up to the time table requested by you, we are making this request. Now, if you can't comply with it, I don't understand why, because I think the documents and materials requested are the kind of things that Mr. Alden could gather in about half an hour. Now, if there is any particular problem on any one of the categories, obviously, we would have to work out some accommodation. But absent some particular problem, it seems to me that in your position of asking for emergency relief, there is some duty for litigants and attorneys to cooperate on a reasonable basis. And I think we have been very reasonable in this matter. And I would hope we will get the same treatment from you.

Mr. BREGA. Thank you for your position. I have stated mine.

Mr. WALLACE. All right. Mr. Alden, obviously we haven't covered all the items today relevant to some of your allegations in the Complaint, and we haven't covered some of the items which we have touched upon in full details, but I would suggest, in view of the hour and the hearing in the morning, that we recess your deposition to some future date which counsel can agree upon which would be convenient to you.

Mr. BREGA. Well, I am not prepared to recess it at this point unless you have concluded your examination. If you want to finish your examination, that's fine. If you want to conclude the deposition at this time, that's fine also, but I don't agree to a recess and to be reconvened at your request.

Mr. WALLACE. I said to be reconvened at the convenience of counsel for both sides and Mr. Alden.

Mr. BREGA. All right. Well, it isn't going to be reconvened for me, because if you're taking the deposition, it should be concluded. I think the Rules are clear in that regard, unless there is a recess for some other reason.

Mr. WALLACE. Well, it's a recess for the reason that the business day is over and we have a hearing the first thing in the morning on your motion for preliminary injunction.

Mr. BREGA. All right. If you want to recess it, you can. I am not stipulating to the recess, you understand that.

Mr. WALLACE. Our position is that the deposition is recessed and we have other materials we would want to cover with Mr. Alden, and out of respect for Mr. Alden, we don't want to keep him here all night. We are likewise not prepared to complete his deposition because we don't even have this initial document request that we have made, and we are going to prepare papers that the Court has requested for filing in the morning. So our position is that the deposition is recessed. Thank you very much, Mr. Alden.

Mr. BREGA. Put on the record that I do not acquiesce to a recess, other than a completion of the deposition. And I will not, by stipulation, other than court order, agree to reconvene the deposition.

(The deposition was recessed at 5:00 o'clock p.m.)

(John Malcolm Alden)

Subscribed and sworn to before me this ______ day of ____________, 1972

My Commission expires

____

(Notary Public)

CERTIFICATE

STATE OF COLORADO,
City and County of Denver, ss:

We, Betram Naster and Thomas T. Tomko, Notaries Public and Certified Shorthand Reporters, State of Colorado, duly commissioned to administer oaths, do hereby certify that previous to the commencement of the examination of the said JOHN MALCOLM ALDEN, said witness was duly sworn by us to testify the truth, the whole truth, and nothing but the truth, and was thereupon interrogated as set forth in the foregoing deposition;

That the said deposition was taken in machine shorthand by us at the time and place aforesaid and was reduced to typewriting under our supervision;

That the foregoing is a true transcript of the questions asked, the testimony given, and the proceedings had;

That we are not attorneys or counsel, or in any way connected with any attorney or counsel, for any of the parties to said action, or otherwise interested in its event.

In Witness Whereof, we have hereunto set our hand and affixed our notarial seal this 7th day of September, 1972.

BERTRAM NASTER,
Notary Public.

My Commission expires June 9, 1974.

THOMAS T. TOMKO,
Notary Public.

My Commission expires December 9, 1972.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
CIVIL ACTION NO. C-4288

ROYAL CROWN BOTTLING CO., A COLORADO CORPORATION, PLAINTIFF *v.* ROYAL CROWN COLA CO., A CORPORATION, DEFENDANT

Proceedings before the Honorable Sherman G. Finesilver, Judge, United States District Court for the District of Colorado, beginning at 1:30 p.m., on the 8th day of September, 1972, in Courtroom D, U.S. Courthouse, Denver, Colo.

APPEARANCES

Charles F. Brega and Gerald Raskin, Hindry & Meyer, Attorneys at Law, 2301 First National Bank Building, Denver, Colo., appearing for plaintiff;

Donald C. McKinley, Holme, Roberts & Owen, Attorneys at Law, 1700 Broadway, Suite 1010, Denver, Colo., and James H. Wallace, Jr., and Thomas B. Carr, Kirkland, Ellis & Rowe, 1776 K Street NW., Washington, D.C., appearing for the defendant.

Whereupon, the following proceedings were had and done, to-wit:

The COURT. Is there anything to report to the court at this time?

Mr. BREGA. Yes, sir, we have not been able to reach any accord in this matter and would like to go with the hearing and are ready to proceed.

(Whereupon, discussion was held off the record.)

The COURT. We will be in recess on this case until 1:30 this afternoon. Would the attorneys give their names to the reporter and who they represent please.

Mr. BREGA. Charles F. Brega and Gerald Raskin for the plaintiff.

The COURT. The record will so reflect.

Mr. MCKINLAY. Attorneys for the defendant, James H. Wallace, Jr., Thomas B. Carr of Kirkland, Ellis & Rowe, Washington, D.C.; Donald C. McKinlay, Holme, Roberts & Owen, 2900 Broadway.

The COURT. Who will be called on behalf of your client?

Mr. MCKINLAY. I think none at this point. We may use them as witnesses depending.

Mr. BREGA. I would like to know who they are going to call.

Mr. CARR. I think tentatively I know who I am likely to call.

The COURT. If you are going to call them, who are they please?

Mr. CARR. Tentatively, Mr. [Ed.'s note: Copy illegible] who is vice-president of our company and then a gentleman who is a bottler in California whose name is John Norton and I think those two will probably be the only witnesses we will likely call, Your Honor. As I say, we may use them.

The COURT. Did you narrow the issues down during the discussions?

Mr. MCKINLAY. Not more than in our position statements and over the last week.

Mr. BREGA. We have agreed on the exhibits.

The COURT. There should be no question about the admissibility of exhibits?

Mr. MCKINLAY. There are two of their exhibits that we don't think are relevant. There is no question about the authenticity of all of them. We are accepting their statement on several of them with regard to authenticity. So essentially there is no problem except the relevancy of, I believe, two.

The COURT. Have they been marked?

Mr. BREGA. Yes, sir.

The COURT. The court will be in recess until 1:15.

(Whereupon, the court was in recess at 12:10 p.m.)

(Whereupon, the court reconvened at 1:40 p.m.)

The COURT. The record should reflect we are proceeding in our Civil Action C-4288, Royal Crown Bottling Co. vs. Royal Crown Cola Co. which comes before the court on a Preliminary Injunction on behalf of the plaintiff?

Mr. BREGA. Yes, Your Honor.

Mr. MCKINLAY. We are—

The COURT. Call you first witness, please.

Mr. BREGA. At this time I would like to offer some exhibits in evidence. Plaintiff would offer Exhibits 1, 2, 3, 4, 5, 6A and B, 7 through 13.

The COURT. Any objection?

Mr. MCKINLAY. Yes, sir. We object to the relevancy of Exhibits 7 and 9 to 13. I would point out in connection—we have no objections to the other exhibits. I would point out with regard just for the court's information, Exhibits 5 and

8 together are attachment B, I believe it is, to our Statement of Position earlier filed with the court. We object to the relevance of 7 and 9 to 13.

The COURT. The court will note your objections. The exhibits will be admitted, please.

Mr. MCKINLAY. We have discussed this briefly, but we haven't made this proposal. We have been trying to expedite the proceeding this afternoon because of Your Honor's schedule and ours and everybody elses. We are agreeable to substituting the transcript of Mr. Alden's deposition yesterday as testimony that he offers here at the Preliminary Hearing together with whatever else counsel wants him to testify to. If this provides a basis, it might shorten the whole thing.

Mr. BREGA. I have no objection to their use of the deposition for their purposes. I do intend to cover some of our side of the issues.

The COURT. This is agreeable to the court. In a cursory way during the noon hour, I did read the transcript and the deposition on John Malcom Alden taken on the 7th of September, but based on the informal conference the court had with counsel earlier, the court did look through areas of interest to the court and of particular interest to this inquiry. I would ask you to call your first witness.

The court will permit you to lead your first witness. Let's get right to the heart of the matter.

John Malcom Alden, called as a witness on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. BREGA

Q. Mr. Alden, give your name and address, please.

A. John Malcom Alden, 2605 East Alameda.

Q. What is your capacity with Royal Crown Bottling, a Colorado corporation?

A. I am president and treasurer.

Q. When did you purchase that company?

A. December, 1968.

Q. Could you tell the court very briefly what the company's function and purpose is?

A. The company's function and purpose is to market—produce, market, distribute, promote licensed trademark brands of soft drinks in bottles and cans.

Q. How many do you produce—do you have under license and franchise agreement from Royal Crown Cola?

A. About half a dozen.

Q. Could you name those for the court?

A. Royal Crown, Royal Crown Cola, Twist of Lemon, Diet-Rite, Flair, Gatoraide Cola and Gatoraide Citrus and Party Pac.

The COURT. How many altogether, please?

The WITNESS. About nine, sir.

Q. (By Mr. Brega) Mr. Alden, could you tell the court how you obtain the concentrate used under this license and franchise agreement?

A. We place an order to the concentrate plant in Las Madra, California. We send the order and check in after making a telephone call requesting delivery.

Q. Who does the bottling in Colorado for the franchised products?

A. There are a group of bottlers in certain country areas. There is a Denver bottler, Fort Collins bottler, Colorado Springs bottler, Alamosa, Grand Junction.

Q. Then the franchise area that you hold, who is the bottler that does the bottling for Royal Crown Cola?

A. Royal Crown Bottling Company.

Q. Did you or the company—bottling company do any of the canning of the products under the franchise?

A. Yes.

Q. Would you tell the court how the canning operation has operated and how it now operates?

A. The canning operation was originally in the hands of the Royal Crown Cola Company of Mountain States through some discussion we had with the vice-president in charge of the Western Division: we discussed the fact in buying the Royal Crown Company which had a bottling facility. We also wanted the canning facility, the rights for canning. After a period of time, we had been in the market about a year, a year and a half, we were advised formally turning over the rights to Royal Crown Bottling at Mountain States. The supplies that

were—and material on hand that were useable and started to can. As soon as we started canning, we found out that as part of this right to can, we were to supply all the Colorado bottlers who may have produced for us to sell to. We had developed our costings and the costings turned out to be a few more cents which Royal Crown were selling to other bottlers and we were criticized because of our higher price. Our higher price was based on cost accounting inside that the office had developed and costs—time cost and supply cost. We said we couldn't sell it at a loss and couldn't work on price fixing. They wanted it set up that way. Subsequently, we found out that they were negotiating with another bottling company in town and had arranged for the other bottling company to can the same items or Royal Crown Diet-Rite items that we were canning.

Q. Stop right there. Could you tell the court whether the bottling company also does canning or tell the court, you know—we are using canning and bottling interchangeably. What is the significance of these two words?

A. Traditionally the word for a producer of bottled soft drinks has been bottler; when convenience packaging developed, bottlers became also canners. If they put in their own canning lines and even though he had canning lines, they still referred to him in many cases as bottlers rather than canning facilities which are either owned as a cooperative group or canning facilities which are custom canners. These people find their business from bottlers whose requirements for cans are not in sufficient quantity to justify the cost of a canning line.

Q. Now, Mr. Alden, is the plaintiff in this action which is Royal Crown Bottling Company also a canner for the franchised products from Royal Crown Cola?

A. Yes, sir.

Q. You did that canning at what facility?

A. At the same facility that the Royal Crown Cola Company of Columbus, Georgia, used. The Mountain States Canning—Mountain States Canners.

Q. When did Royal Crown Cola, the defendant, give you a right to be a canner of the franchised products, just roughly?

A. The latter part of 1970, about September or October.

Q. Thereafter, did you do canning for yourself, for the franchised products that we are talking about?

A. We did.

Q. Then did Royal Crown Cola notify you that you could no longer have your own product?

A. We received a notification several months ago.

Q. Did they tell you when you would not be allowed or what date you would not be allowed to can after?

A. It was—the notification was 60 days subsequent to that letter—date of the letter which would bring it into August 27th because the rights to can were cancelled.

Mr. Brega. Your Honor, that is Exhibit 9 of the exhibitis here, date June 27, 1972.

Q. (By Mr. Brega.) Now after that time, were you notified by the defendant, Royal Crown Cola, who was to be their bottler in your franchised area or canner?

A. At which time, sir.

Q. After you could not can yourself.

A. We learned through suppliers in the early part of 1971 that another bottler had been set up to make Royal Crown and Diet-Rite cans simultaneously with the time we were doing it.

Q. Would that be the 7-Up Bottling Company of Denver?

A. What about it, sir?

Q. Is that the company that does can for your franchise?

A. They are canning Royal Crown Diet-Rite cans.

Q. Under the franchise and license agreement you have with Royal Cola?

A. I don't know what the arrangements are.

Q. But I mean, they are canning these products for you, the products that you have under the license and franchise agreement?

A. As a bottler, we can withdraw from their supply.

Q. Have you been notified by 7-Up Bottling Company as to any quota that your company had been placed on and if so, when?

A. I was out of town at the time. Our sales manager received a call during a period of orders being filled, telling him that a truckload that was just coming in was the last.

Mr. McKinlay. Excuse me. We have heard some hearsay already. I think the witness should be cautioned about testifying to any hearsay.

The Court. Let's try to stay away from any hearsay.

Mr. Brega. I was trying to expedite.

The Court. This witness does not have the privilege I do.

Q. (By Mr. Brega.) Would you tell the court where you were on August 8th, 1972?

A. In Washington, D.C.

Q. What was your purpose in being there?

A. I was invited by Senator Hart's Committee on—Subcommittee on Judiciary Anti-trust and Monoply to testify on the food industry and soft drink industry.

Q. While there, did your company have orders with the 7-Up Bottling Company for canned goods?

A. Orders and checks signed for presentation upon delivery of the orders.

Q. Have you received any or did you receive any shipments from 7-Up Bottling Company between August 10 and September 1st, the date that we filed this action?

A. None.

Q. Did you have orders with 7-Up Bottling Company during that period of time which were unfilled?

A. Yes, sir.

Q. About how many case orders had you supplied to 7-Up Bottling Company at that time that were unfilled

A. For August, about 16,000 cases.

Q. Did you talk to the 7-Up Bottling people yourself?

A. No, the sales manager did.

Q. His name is what?

A. Mr. Hunt.

Q. Now, between the time that you testified in Washington and when we filed this action, did you receive any products from 7-Up Bottling Company under the franchise agreement that you had with Cola?

A. No.

Q. Do you know the connection between 7-Up Bottling Company or who owns the company?

A. Yes.

Q. Who owns 7-Up Bottling Company?

A. It's my understanding that 7-Up Bottling Company of Denver is owned by Beatrice Foods or Beatrice Soft Drink Division, if it has another name.

Mr. Brega. The correspondence indicates that in evidence, Exhibit 10 specifically that 7-Up Bottling Company of Denver will be the bottler for Royal Crown Cola beginning in about 1971.

Q. (By Mr. Brega.) Did Beatrice Foods have—

The Court. '71, counsel?

Mr. Brega. '71 and again in 72. It was actually set up until we were cancelled.

Q. (By Mr. Brega.) Did Beatrice Foods have any franchise territories for Royal Crown products?

A. The public information establishes that they have the major part of California which includes some of the Los Angeles——

Mr. McKinlay. That answer is not responsive. He can testify what he knows of his own knowledge, not what he has read in the newspapers.

The Court. What is the basis of your knowledge, please.

The Witness. Well, I have talked to the people from the Royal Crown Bottlnig Company in Los Angeles who acknowledged its owned by Beatrice Foods.

The Court. Overruled. Let's go ahead, please.

Mr. McKinlay. Royal Crown Cola in Los Angeles is not this company.

The Court. Let's go ahead. I am going to allow it.

Mr. McKinlay. May we have a continuing objection to this?

The Court. The continuing objection will be reflected on the questions related to this issue.

Q. (By Mr. Brega.) I think Beatrice Foods is a franchisee of Royal Crown Cola; is that correct, sir?

A. (By the witness.) Yes, sir.

Q. Is your answer, yes?

A. Yes.

Q. Mr. Alden, to your knowledge is Royal Crown Cola also a canner or bottler as we describe them?

A. Yes.

Q. Do you know some of the areas that Royal Crown Cola has where they do their own canning or bottling?

A. Chicago, St. Louis, Minneapolis and in a number of areas in Florida. They did own and operate Salt Lake City, but I was told it was sold.

Q. Mr. Alden, what happened to your business after August 10 and between then and September 1st when Royal Crown Cola would not deliver any franchise products to your company?

A. We suffered a rather immediate and irreparable harm in terms of product availability in the major super markets. We lost our shelf space in many places; shelf space which took a long time to build up and develop. We still haven't got all of our shelf space back in many of the stores. Our cash flow was badly disrupted. Our sales went down. We caused some illwill with customers because we couldn't deliver products that affected some of the other soft drinks we had, not being sure whether they could count on regular delivery business, they didn't know what our problem was and we may have lost some substantial business in the future which is incalculable at this time.

Q. Did your company have vending machines in operation?

A. It does. We have had several vending machine locations call and request us to pull the machines out because they didn't have cans in them and they didn't want empty machines.

The Court. Mr. Brega, let's get right to the questions in this case in regard to what was—under the license and franchise agreement, what were the reasonable needs; how he feels that he has been grieved and his potential problems in the future with regard to the supply limitations of colas and so forth. These key questions I would like to get into.

Q. (By Mr. Brega) Mr. Alden, you recognize that your quota for September was set at 6.100 cases?

A. I have heard that figure.

Q. Would you tell the court how many cases of the franchise products you feel you will need for the months of September, October, November and December?

A. The Royal Crown Bottling Company in Denver can generate sales on these canned items totally, 35,000 to 45,000 cases.

The Court. Per month?

The Witness. Per month.

Q. (By Mr. Brega) Would you tell the court whether you sell these products all to purchasers within the franchise area?

A. We sell all these products to accounts that originate in Denver.

Q. In fact, there are some of these products sold out of the franchise areas?

A. Yes.

Q. Would you tell the court approximately, if you know, what percentage or how many cases per month would go out of this franchise area based on the 40,000 case per month need?

A. Approximately 28,000, 30,000.

Q. n other words, would you tell the Judge exactly what that means?

A. That means that in maintaining as we feel we should the dominion of the fact we sell to a distributor who will sell in outside marketing areas where primarily chain stores and warehouses, where they are interested in buying the product.

Q. If you are not able to have these cases of 40,000 for the next few months, would you tell the court how this affects the company's business, growth, development and how it may be damaged?

A. Well, it wuld deteriorate very substantially. The Royal Crown Bottling Company's sales, tonnage and profit and cause concenience packages which is becoming a more major part of the total sales, it would be substantial which we haven't calculated yet.

Q. You have orders presently unfilled for the franchise products and if so, how many case orders do you have?

A. We have for the month of August, approximately 16,000.

Q. How about for September?

A. Approximately 35,000.

Q. Now, can you tell the court an approximation of how many of these cases you would sell to purchasers outside of the franchise area?

A. Unrestricted, unavailable?

Q. Yes.

A. It would be anywhere in the area from 40,000 to 60,000 cases a month.

The Court. Have you ever sold that many?

The WITNESS. We have not had it available?
The COURT. What is the most you have ever sold?
The WITNESS. About 40,000.
The COURT. When was that, please?
The WITNESS. The month of June.
The COURT. This year?
The WITNESS. Yes.
Q. (By Mr. Brega) Could you tell the court how many cases that you have sold for the first seven months of 1972 of the franchise products that were canned?
A. Approximately 124, 125,000 cases.
Q. Could your company continue to sell that amount of cases for the remainder of 1972?
A. Readily and more.
Q. Now, in addition to your canning of the franchise products, do you also bottle the franchise products?
A. We do.
Q. Has Royal Crown Cola cut off your bottling supplies?
A. No, except there have been several occasions where the shipments have not been as prompt as they had been which is usually about four days after a telephone call and——
Q. What is the significance of the difference between bottles and cans in this industry?
A. I would like to have you restate that question.
Q. The defendant has not limited you at this time to selling bottles, but they put you on quota on cans. Can you give me what you consider to be the reason for that?
A. The facts clearly indicate that there has been—that the soft drink bottle is returnable in packages and of course, returnable packages limits your activity to route selling and in-store deliveries. However, the chains are not most receptive. They want their products delivered in the warehouse, so obviously the market place takes care of the demand in so far as the returnable bottles and cans are concerned.
Q. Was Royal Crown Cola aware of the fact that you were selling products which were eventually consumed outside the franchise area?
A. Completely.
Q. Would you tell the court when they became aware of that fact?
A. The first occasion I gave that to them was in February at a sales meeting we had here by a man who was then on the Royal Crown Cola company's staff and now I understand is a sales manager of the Royal Crown Bottling Company in Los Angeles.
Q. What is his name?
A. Al Price.
Q. Tell us how Mr. Price informed you that they were aware that you were selling or the products were being shipped out of the franchise area?
A. In solicitation of business from chain stores, they said they saw the invoice. On those invoices, we had other products that are not Royal Crown products. We had an apple beer and also had sarsaparilla items.
Q. From February until August, did you have any communications from Royal Crown Cola asking you to stop selling products which found their way outside of the franchise area?
A. Yes, shortly after Mr. Price's visit to the area, the two gentlemen from Columbus, Georgia, arrived in town; invited me to lunch——
Q. Tell us who they were?
A. Ed Smith.
Q. What is his position?
A. His position was vice-president in charge of western operations and he has been transferred to vice-president in charge of midwest or central states operations.
Q. Who was the other gentlemen?
A. Mr. Wolff who had been a vice-president in charge of sales, whom was—who is now functioning as vice-president in charge of western operations.
Q. Tell us what transpired at that meeting?
A. Mr. Smith said very little, but Mr. Wolff made a few specific remarks. In substance, "We frown on your selling to the warehouses. We would like for you to stop doing it."

Q. Do you have any control of where the warehouses ship the product after they purchase it from you?

A. In this business or any other business, it's been my knowledge that the buyer is—does not have to tell the seller what he does after he sells it.

Q. Warehouses that you sell to?

A. In southern California; is that what you like?

Q. Tell us some here.

A. We have been selling to Del Farm here; we sell products for Safeway; we sell products for Associated Grocers.

Q. Do these warehouses have outlets outside of your franchised area?

A. Safeway Division here is operating in five states with 161 stores.

Q. Can you control where they ship this product after you sell it?

A. Their central returns, the movement of materials, the movement or control, we have no control.

Q. If you are not allowed to have the number of canned products that you need, would you tell the court what would happen to the development of the business that you are developing on the west coast?

A. It will disintegrate and be minimal or nil except for a few non-Royal Crown brands.

Q. Tell us how you develop a product sales such as you are doing to the franchise products?

A. I don't think I understand.

Q. How hard is it to develop sales for products such as you are selling?

A. Well, selling the prime market—supermarkets and warehouses is very, very difficult. The food industry is one built up with non-food products which are fighting to get space in the warehouse which is now overcrowded and fighting for space on the shelves which are overcrowded.

Q. How will a delivery and your selling these products affect the business of your company?

A. It will deteriorate, disintegrate sales, cut into profit, tear down present cash flow ratios.

Q. Is there a way you can readily build that back up if you are later a victor in this case?

A. Yes, after having suffered damage, but not being quite sure whether we can reach the same plateau.

Q. Now, have there been any franchises who have sold products in your franchise area that have products that have come in Royal Crown products?

A. Yes, for nearly a year—about a year, we have had a bottler in a continuous area actually drive his truck into our area. I use the word "stolen," stolen our glass, all the glass flow—glass that costs us about $12 a gross; it is out a bottle charge which is substantially less and he has taken our glass out of our territory and back into his own bottling plant which is another area.

He has had special deals of one with five special promotional—

Mr. McKinlay. Your Honor, I object. The answer is not responsive. He is talking about something unrelated to us.

The Court. This relates to Royal Crown?

Mr. Brega. The next question will tie it right in.

Q. (By Mr. Brega) Mr. Alden, did you notify the Royal Crown people of this?

A. We notified the area manager shortly after our sales manager had learned it from the route salesman. We notified Mr. Smith and Mr. Wolff very specifically in that meeting in February when they said they didn't countenance this. They said this is more serious and what you are doing about it. We have mentioned it a half a dozen times to about four or five of their executives.

The Court. Let's go into another area. The court is not going into fulfillment of the contract over all the relationships between the licensee and franchisee and franchisor.

Let's go ahead, please.

Mr. Brega. I would state for the record—the record would show that Royal Crown Cola has known of violations of territorial restrictions in other cases of licensed franchises, but they have done nothing in this regard to the knowledge of the plaintiff to restrict this by at least a smaller licensee-franchisee. I would further go on to show the court our evidence would be offered to show that the licensee-franchisee in the California area has always been shipping outside of the area with the knowledge of the Royal Crown Cola Company, we think.

We think that, Your Honor, is a significant point in the question of whether a Preliminary Injunction shall be issued on the basis of their having knowledge of these other acts and also on the basis of the fact that they have been aware of the fact since February that this product has been going outside the state.

The COURT. You are offering this as an offer of proof and it will be reflected in the record.

Let's go ahead, please.

Mr. McKINLAY. May we record our objection as being far beyond.

The COURT. The court is not going to allow it. The court feels it is beyond the purview of what the court feels the issues are in this case.

Q. (By Mr. Brega.) Does Royal Crown Bottling Company, the plaintiff here, sell any products outside of the franchise area?

A. Not the Royal Crown Bottling Company.

Q. The plaintiff, I am talking about.

A. No.

Q. All of your sales then fall within the franchise area?

A. Yes, sir.

Q. Now, do you sell to a company, an entity called General Beverage?

A. Yes, sir.

Q. Are you a principal in General Beverage?

A. I am.

Q. Did General Beverage make sales of the franchisee products?

A. That included in the products they offer.

Q. Do some of these products go outside of the franchise area from General Beverage?

A. They do.

Q. But none are sold outside of the franchise area by the plaintiff?

A. No, sir.

Q. How long did it take you to build up the promotion and sales of products such as the franchise products we are talking about?

A. Well, it is continuous programming to develop a high share of market. Sometimes it is never achieved and other times it can be developed. A lot of man hours go into trade work, a lot of dollars go into cooperative advertising, sales promotions as well as consumer advertising. It is hard to put a timetable on it.

Q. If the court does not grant a Preliminary Injunction in this case, will that have any adverse effect on this development of busines by the plaintiff's company?

A. It definitely will as it has shown in August.

Q. How will it affect from September on?

A. By continuously bringing sales down to low selling point, particularly on the canned products and losing shelf space, losing trade, good will and some of the trade good will rubs off in lower—into the glass products which are delivered off the trucks.

Q. How would this affect your employee number?

A. Well, it was already affected in August. Several of the route men as a result of losing of some of their commissions, not having cans that they normally would sell, complained—they all complained. Three of them quit, two or three and then we decided to subsidize them on a weekly basis in the amount of money that they lacked in commissions.

Q. How would this effect your truck fleet

A. This would mean the truck fleet would get weaker, would be difficult to re-route because the word gets around.

Q. Are you saying some of your trucks would be idle?

A. Yes, sir.

Mr. BREGA. May we have one minute, please?

(Whereupon, Mr. Brega had discussion off the record with associate counsel.)

Q. (By Mr. BREGA.) Would you tell the court approximately what percentage of your business is down at this time with General Beverage?

The COURT. What time period?

Q. (By Mr. BREGA). Let's say August of 1972.

The COURT. Are you referring strictly to the Royal Crown items?

Mr. BREGA. Yes.

The COURT. Why are you referring to the total Royal Crown business?

Mr. BREGA. The franchise products—

A. (By the witness) The total franchise—in August, it was approximately 33⅓% on filled and shipped orders.

Q. (By Mr. BREGA.) Does all of General Beverages sales go outside of the franchised area?

A. In General, yes.

Q. That was based on approximately 40,000 cases per month need?

A. Yes.

Mr. BREGA. Your Honor, I have offered all those exhibits, but rather than go through each one, I think the court can read them.

The COURT. The court has accepted them.

Mr. BREGA. I have no further questions on direct.

The COURT. I think it might be convenient to take a short break and go into this other matter of a criminal case.

We will be in recess for about 15 minutes. You may leave your materials right on the desk, please.

(Whereupon, the court was in recess at 2:29 p.m.)

(Whereupon, the court reconvened at 2:52 p.m.)

The COURT. Mr. Brega, do you have any additional questions of the witness?

Mr. BREGA. Yes, sir.

DIRECT EXAMINATION CONTINUED BY MR. BREGA

Q. Mr. Alden, in paragraph four of the License and Franchise Agrement, it states "The bottler shall buy products, manufacture, promote, deliver services to companies and otherwise actively build and maintain a full volume of patronage for Royal Crown beverages." Can you do this on the 6,190 case quota that you have been given for the month of September?

A. No, sir.

Q. Now, could you tell us in your opinion what is the reason for this protest being placed on the bottling company?

A. It appears in my opinion a prejudicial move to restrict us. It appears as a prejudicial device to restrain us on territory shipments and dominion control on products.

Q. Is the franchise making any sells outside of the franchise territory?

A. The franchise is selling and building everything in the Metropolitan area.

Q. That is——

A. The franchise territory.

Q. Now, the quota for September was 6,190 cases, can you tell us how many cases have been delivered to you at this time?

A. Approximately 5700.

Q. Do you presently have any inventory—unused inventory of this month?

A. I haven't been in the warehouse in the last 2 days. I calculate it is pretty well down.

Q. You have 400 more cases under the quota and will that suffice to take care of you for the month?

A. No, sir.

Q. When you finished with these will this have the same adverse affect on your vending machine fleet and employees?

A. Same as we suffered in August.

Mr. BREGA. You may examine.

CROSS EXAMINATION BY MR. WALLACE:

Q. Mr. Alden, just a couple of quick questions.

Mr. Alden, you testified at the beginning of your testimony as to your operations as a canner of Royal Crown products. Would you state for the record, sir, whether you or any of your affiliated companies owns any canning machinery?

A. None.

Q. Have you or any of your employees actually canned products and by that I mean have any of your employees actually run canning equipment?

A. No, we have no canning facility as such.

Q. But you did handle the paper work for such canned products during a period of time; is that correct, sir?

A. We handled more than paper work. We bought the supplies, we maintained inventory and warehouse stocks.

Q. You didn't do the actually canning?

A. We had a custom canner, Mountain States, whom we paid a production sum per case.

Q. Sir, you have testified about your ability to obtain canned Royal Crown products. When was the first time that you were informed that limitations might be placed on the number of cans which would be supplied to you, sir?

A. There was an indication in a meeting in my office about the last week of June that there was going to be a letter forthcoming informing me of a quota policy and a letter that would indicate a termination of canning rights; that was part of the conversation in that meeting.

Q. This was in June of 1972, sir?

A. Yes, sir, the last week of June as I recall.

Q. Some five or six or seven weeks prior to your testimony before Senator Hart's committee; is that correct, sir?

A. It was about two weeks before the actual testimony, but it was subsequent to the release of a press announcement on who was going to be at the hearings.

Q. I am confused. I thought you said you testified before Senator Hart about August 9th?

A. That's correct.

Q. You were first given this indication of possible limitation on the number of cans to be supplied to you toward the end of June?

A. That is correct.

Q. Mr. Alden, do you recall yesterday during your deposition you identified a company called General Beverage Company?

A. I do.

Q. Is that essentially you, Mr. Alden?

A. At the moment.

Q. Would you—when you were responding to your counsel's questions, it was asked to you twice, once before and once after the break as to if all your sales of Royal Crown products were within your franchised area?

A. Yes.

Q. Now, when you responded to that question in the affirmative, you were including transfers via General Beverage Company; is that correct?

A. Royal Crown Bottling Company sells to a company and invoices Interstate Beverage and Interstate Beverage sells to General Beverage and invoices.

Q. Now, I believe yesterday, Mr. Alden, you testified that Interstate Beverage—

Mr. BREGA: Just a minute. I object; that is improper impeachment. If he is going to impeach, do it according to the rules of the Tenth Circuit.

THE COURT: Proper impeachment on depositions is to ask the question, get an answer; do you feel there is a deviation from the answer in the deposition. You should ask "Was this question asked and was this answer given" in that way. Let's get to the heart of the matter.

Q. (By Mr. Wallace.) How many different names do you operate under, Mr. Alden, please?

A. There is Royal Crown Bottling Company, Interstate Beverage Company which sells and General Beverage which is a national distributor of national brands; all brands, not only Royal Crown and Diet-Rite, but all brands available.

Q. You have some connection with all these companies?

A. Yes, sir.

Q. Where is your place of business?

A. All in the same area.

THE COURT: Next question.

Q. (By Mr. Wallace) Mr. Alden, are the sales of Royal Crown products which are made by Interstate Beverage Company and General Beverage Company all within the area of your franchise?

A. Royal Crown Bottling sales are all made right in Denver. Interstate and General Beverage—Interstate as I said yesterday and again today sells outside of the metropolitan Denver area and so does General Beverage.

Q. Outside of your franchise?

A. I have nothing to do with the franchise area.

Q. Sir, you testified about a luncheon meeting with Mr. Ed Smith and Bob Wolf earlier this year?

A. I did.

Q. Did you make a tape reocrding of that meeting?

A. I had a tape recording at that luncheon which I——

Q. A tape recording operating?

A. Partially.

Q. Did you recall that at your deposition yesterday, we requested you to bring a copy——

A. I do.

Q. ——of the tape recording with you today? Do you have a copy of it?

A. I do not.

Q. Do you recall that you testified that that was at your home?

A. I said at my home or office as I recall.

Q. Did you attempt to find it?

A. I worked with my attorneys til late at night and I considered my health more important. I went to bed and got up this morning and had to rush off to another meeting with the attorneys. I shall produce it.

Q. Sir, you testified regarding problems with your route men quitting on your direct examination. Have you had problems with route men quitting prior to the last few weeks, sir?

A. We have had continuous problems recruiting, training and holding the route salesmen, but it has never been as acute for a specific reason as it was when we didn't have these cans.

Q. When you purchased this business at the beginning of 1969——

A. '68, sir.

Q. You took over the beginning of 1969; is that correct, sir?

A. Yes.

Q. Could you explain to the court how many route men were on the territory?

A. Approximately 12.

Q. Explain to the court how many route men you presently employ?

A. Approximately 5 or 6.

Q. Would you explain to the court how many route men you employed say as approximately June 1 of this year?

A. Either 8 or 9; possibly 8.

Q. Now, to the extent you sell canned products via Interstate or General Beverage Company which go to say California customers or other customers outside the state, does this deprive your route men of cans which would otherwise be on their trucks?

A. Well, obviously if you have a very limited amount and use it over here, you are not going to have it in area B. At the time they were deprived, we have no knowledge of any quota or exceeding quota. We had scheduled what they thought would be cans coming in and we were planning to fill the orders and when we filled the orders, we were abruptly shut off one day so we didn't have cans because we saw no possibility anticipating it at the time.

Q. You refer to abruptly shut off. What do you mean by that? When did that occur?

A. Some orders were not going. We had no indication they were coming over and didn't arrive.

Q. What is the approximate date on that, sir?

A. This was when I was out of town.

Q. Which was in August?

A. Nine or ten.

Q. After the indication that was given to you in June there might be limitations; is that correct, sir?

A. This was after discussion on the subject.

Q. Sir, you previously testified that you were president of the plaintiff, Royal Crown Bottling Company. Are you also a stockholder and director of that?

A. As I claimed yesterday.

Q. Would you state for the record, the precise amount of money you have invested in this company, sir?

Mr. Brega. I don't think that is material. The amount of the purchase price of the company, we don't have any objection to.

The Court. You are the principle in these three companies?

The Witness. Yes.

The Court. I don't think it is necessary.

Mr. Wallace. Your Honor, if I may request your indulgence. Mr. Alden's testimony yesterday was he testified to the effect that he was not the true principal in interest in these series of companies. Now, I am not suggesting—I think there is a communication problem with Mr. Alden.

The Court. Interstate Company, the General Beverage Company what is your interest in these respective companies, please?

A. I am agent for Royal Crown Bottling. I am president and treasurer, all the stock of Royal Crown Bottling Company is owned by Interstate Beverage. I am president and treasurer of——

The Court. Of Interstate?

The Witness. Yes.

The Court. What is your interest—your financial interest in that company; you own substantially——

The Witness. Stockholder agreement. I am the major stockholder on a stockholder agreement.

The Court. What about General Beverage.

The Witness. There is no other principle but myself; that is a new company that has been started as a national distributor. We are just getting that underway.

Mr. Wallace. I think that is a false impression when he says he is the major stockholder and I think the true impression could be put on the record if you will just answer the one question.

The Court. Let's go ahead.

Q. (By Mr. Wallace). Would you explain to the court how much money you invested in Interstate or Royal Crown Cola?

The Court. What does his financial investment have to do with it if he owns most of the stock if that is the case. I am more interested in percentage of ownership rather than cash investment.

Mr. Wallace. As I understand it, Mr. Alden has refused to answer what the stockholders agreement is.

The Court. How many stockholders are there?

The Witness. A group of 4, sir.

The Court. How many?

The Witness. Four.

The Court. Are you one of the 4?

The Witness. We have a stockholder's agreement. I thought that I could not present any of the detailed information without the directors' permission which I stated yesterday.

The Court. Are you one of the directors?

The Witness. Yes.

The Court. I think the court sees the picture. Next question, please.

Q. (By Mr. Wallace). Have you called the Board of Directors to consider the filing of this law suit?

A. No, we have not had that in the form of the Directors' meeting.

Q. Mr. Alden, do you recall yesterday in your testimony you indicated that you had projected your estimated damages in this case in two forms. One on some pieces of paper, one in finalized——

Mr. Brega. I object as being an improper question. If it is impeachment, it is improper.

The Court. Let's get to the heart of the matter. I want to hear exactly what the facts are. Overruled. Let's go ahead, please. Ask the question again.

Q. (By Mr. Wallace.) Have you been able to locate any of these materials, Mr. Alden?

A. I have the list you gave me last night and I will see that that material is all provided to my attorney within a reasonable period of time, collating it all together.

Mr. Wallace. I have no further questions.

Mr. Brega. Only one or two.

REDIRECT EXAMINATION BY MR. BREGA

Q. Mr. Alden, you heard on August 9th, you had been put on a quota?

A. That is the first we heard of a quota having been put on and shut off of merchandise because the quota had been exceeded.

Mr. McKinlay. Object to the question and of the answer and ask it be stricken. It is a leading question wholly contrary to what he just got through saying on cross examination.

The Court. Overruled.

Mr. Brega. That is all I wanted.

The Court. Any further questions, please?

Mr. Wallace. No.

Mr. Brega. Nothing at this time.

The Court. Mr. Alden, in the License and Franchise Agreement in paragraph 5 it states a license of the bottler to sell Royal Crown Beverages and to use the Royal Crown Trademark is described territory and the bottler shall not sell Royal Crown Beverages for any person for resale without the limits of said territory. What does that mean to you, please?

The WITNESS. Well, sir, in terms of today's economic climate and with the understanding I have of procedures on territorial restrictions, I thought that it might be antiquated.

The COURT. This is what was stated?

The WITNESS. Yes, but that applied to direct selling to anyone outside of the territory. We received admonishment for selling to warehouses in the metropolitan Denver area as well as subsequently selling to General Beverage which was set up as a national distributor of all brands.

The COURT. Do you think that you could sell to individuals without the jurisdiction—without the territory if you used other companies; was this your feeling?

The WITNESS. Yes, sir, until the actual—the actual rulings were effected that the FTC has issued a position on.

The COURT. Are there any questions as a result of the court's questioning, please?

Mr. WALLACE. No.

The COURT. For Royal Crown Bottling to take care of its customers within the territory that has been assigned to them, are we talking about 6,000?

The WITNESS. We think between 8 and 10,000.

The COURT. That is for primary consumption or sale within the territory; is that correct, please?

The WITNESS. Including warehouses that are here in town.

The COURT. Is that right? Do you think that is as high as 10,000?

The WITNESS. I believe so.

The COURT. Out of that 10,000, how much would go out to other parts?

The WITNESS. None of that 10,000.

The COURT. Consumed in this—you think 8 to 10,000?

The WITNESS. Consumed in metropolitan Denver.

The COURT. This would be by virtue of Royal Crown Bottling; is that correct?

The WITNESS. The route sales and direct sales to chains and warehouses.

The COURT. Without going through Interstate and General Beverage?

The WITNESS. Yes, sir.

The COURT. Eight to ten thousand would go to Royal Crown Bottling? Anything further, gentlemen, please?

FURTHER CROSS EXAMINATION BY MR. WALLACE

Q. Mr. Alden, of these figures, 8 to 10,000 that you gave to the court, are these precise figures or estimates, sir?

A. Projection. These are projections based on what we feel we can sell Royal Crown Bottling Company through the field and directly to warehouses based in town.

Q. Sir, could you say for the record whether you have ever sold that large a quantity of Royal Crown Cans for consumption in the Denver area?

A. There may have been one or two months at the peak of the selling season. My reason was in response to the judge's question, what could we sell through Royal Crown to accounts in the area and my answer is 8 to 10,000 cases.

Q. Would you state the average number of cans which have been sold by your company for consumption in the Denver area—your franchise area—during the last 12 months?

A. That would be very hard to do from memory. It would run anywhere between 6,000, 7,000, 8,000 cases I would say with a high and possibly 1 month of 9,000.

Q. Is consumption up or down through September-October?

A. For September-October of the months ahead? Your projection is higher.

Q. What does the business reflect generally through the past history?

A. Well, the past history shows a trend in growth in cans and depends on whether they are returnable glass. Thermal charts help, but not too much. It's a pretty steady business.

The COURT. Anything further?

Thank you, Mr. Alden, you may be seated.

Mr. BREGA. Mr. Howell.

John B. Howell, called as a witness on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. BREGA

Q. Mr. Howell, would you tell us your name, address and occupatiton, please.
A. My name is John B. Howell, my address is 1733 South Ivy Street in Denver. My occupation is General Production Manager, 7-Up Bottling Company of Denver.
Q. Could you tell us what the relationship is between 7-Up Bottling Company of Denver and Royal Crown Cola?
A. Royal Crown Cola Company?
Q. Yes.
A. We are a contract center for their products for 5 of their canned items.
Q. These include Royal Crown and Diet Rite?
A. Yes.
Q. You actually do the processing?
A. We do the physical packaging.
Q. With their label?
A. They supply the merchandise. We supply the water and CO_2 base.
Q. On contract basis?
A. Yes.
Q. You receive the concentrate from the Royal Crown Cola Company in California?
A. That's correct.
Q. Then you put the concentrate in the can and then deliver it to the bottler if you are selling it for instance to Royal Crown Bottling Company?
A. Yes, sir.
Q. Now, the way this works, Royal Crown Bottling Company gives you an order which is directed to Royal Crown Cola, but they send it to you and then you fill it?
A. That's correct.
Q. Does Royal Crown Bottling Company pay for the bottling of this or do they make the checks out to Royal Crown Cola?
A. Royal Crown Cola, a Bottling Company, would make checks payable to Royal Crown Company which we then forward on a weekly basis. We are reimbursed, but the company in Columbus, Georgia, also pays on a weekly basis depending on what we produced, not what we had said.
Q. Do you have a copy of the contract between 7-Up Bottling and Royal Crown Cola?
A. I have an unsigned——
Mr. Brega. I am going to mark this as Exhibit 14.
Q. (By Mr. Brega.) Mr. Howell, is this an unsigned copy of the Agreement between Royal Crown Cola and 7-Up Bottling Company on the bottling of franchised products for Royal Crown Cola Company?
A. No, sir, this is for canning only.
Q. Excuse me, I mean canning.
A. Yes, sir.
Mr. Brega. I move for the admission of Exhibit 14.
The Court. Has counsel had a chance to see this?
Mr. McKinlay. Never suggested to us, Your Honor. It appears to be a xerox copy. I might say it has absolutely no date in the first place and I don't see the relevancy here.
The Court. Mr. Howell, are familiar with the basis of understanding between you and Royal Crown Cola Bottling Company?
The Witness. Yes.
The Court. You are operating under this? Is there a signed contract?
The Witness. We couldn't locate it this morning.
The Court. Has it ever gone through any revisions or any interlineations?
The Witness. Not substantially, no.
The Court. You would know if there was—you were privy to the preparation of this contract?
The Witness. Yes, I was.
The Court. With that limitation, the court is going to allow it. It is not probably the best evidence. For the purpose of this hearing, the court is going to consider it as a working agreement.
Q. (By Mr. Brega.) Could you tell us when the contract was entered into with Royal Crown Cola Company and 7-Up Bottling Company: what year was it?
A. It was 1971 in the spring.

Q. Now, Mr. Howell, could you tell the court whether the Royal Crown Cola Company had given you any quotas for Royal Crown Bottling Company of Colorado prior to August of 1972?

A. We received one in late July.

Q. For the Royal Crown Bottling Company?

A. Yes.

Q. What was the amount of that quota? Are you sure you are talking about the right month?

A. Yes, I am. The amount in July was 7,629 cases.

Q. Was that the number that is the quota given?

A. Yes, sir, there was.

Q. Did you pass that quota on to Royal Crown Bottling Cmopany?

A. There was only two or three days for the month of July.

Q. What was that quota again?

A. 7,629 cases.

Q. But you yourself did not pass that on to anybody with Royal Crown Bottling Company?

Mr. McKinlay. Your Honor, I object to leading questions and the witness has already answered these questions and now he is trying to push him. It is a leading question.

Q. (By Mr. Brega) Did you pass this on to Royal Crown?

A. I don't recall.

Q. But you knew this was operative and you were willing to operate under that?

A. That's correct.

Q. Did you operate under that principle?

A. We did.

Q. Did you prepare so many cases?

A. As of that point, we had shipped nearly that many and were not requested to ship any thereafter. The reason we didn't have any conversations about it was there was no need for any.

Q. What was your directive to the best of your ability from Royal Crown Cola Company?

A. It was verbal from a Mr. Richard Summerland who was in our offices. Sorry, I don't know exactly what the date was. It was sometime in the last week of July, approximately the 25th.

Q. Royal Crown Cola Company—who contacted him, if you know?

A. Mr. Summerland is the representative of the Royal Crown Cola.

Q. How was that delivered to you?

A. Personally.

Q. He stopped in your plant?

A. That's correct.

Q. To your knowledge, did you discuss this matter with him at this time?

A. We did.

Q. To the best of your knowledge, what was the discussion—your recollection?

A. I am not sure what his purpose was for being in Denver, but his being in Denver, this was the first time he had and he came out to visit our facilities and apparently he was newly assigned to this function of supervising the contract canners. While he was there, he toured our facilities and discussed with us that they had planned to implement some quotas on bottlers in canned products and requested that we abide by those quotas.

Q. At that time he told you verbally what the quota would be?

A. Either then or the following day perhaps by telephone.

Q. What was the quota?

A. The quota for July was 7,629 cases.

Q. Was there anything for a quota for August-September?

A. None. We received a quota for August on August 10.

Q. What was that quota?

A. 6,562 cases.

Q. Did this come from Summerland again?

A. Yes, it did.

Q. Verbally to you?

A. That's correct by telephone.

Q. What about the quota for September?

A. The quota for September we received on the 1st of September and I believe Mr. Summerland was here or contacted my father on that date. My father is general manager of 7-Up Bottling Company and the quota for September was 6,190 cases.

Q. Do you have any future quotas or do you get them almost monthly?
A. I assume we would get them monthly. We have none beyond September.
Q. The quota that you got right around the 1st of September is for the month of September?
A. That's correct.
Q. For the current month?
A. Yes.
Q. How many cases of cans have you delivered to Royal Crown Cola Bottling Company at this time in September?
A. 5,712 cases, that is for September.
Q. That means that you are allowed to give them 400 more cases for this month?
A. Approximately.
Q. Now, could you tell us when you notified the Royal Crown Bottling people that they were on a quota; what is your first recollection?
A. For September?
Q. The first time you remember? Do you recall doing it in August?
A. Let me review this and maybe I can tell you.
I don't recall specifically, but I know we would have had conversation with them on August 10 at the latest.
Q. At the time you received the quota in August, isn't it a fact you had already shipped more than that quota to Royal Crown Cola Bottling Company?
A. That's correct.
Q. Was there any in August?
A. That's correct.
Q. Didn't you tell the bottling company they had exceeded the quota again?
A. When we received the quota as of that point, they had received all they were allowed and then some in fact.
Q. Did Royal Crown Cola tell you when they would establish a quota for October, November and December for the bottling company?
A. No, they have not.
Q. Prior to July, had they, Royal Crown Cola, given you a quota for the bottling—Royal Crown Cola Bottling Company?
A. No.
Q. Had they for anytime prior to that set a quota that Royal Crown Bottling Company could receive from you?
A. No.
Mr. Brega. Nothing further.
Mr. Wallace. No cross examination.
The Court. May Mr. Howell be excused?
We appreciate your presence. You may remain or leave as you see fit.
Mr. Brega. Mr. Hunt.
JAMES E. HUNT, called as a witness on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. BREGA:
Q. State your name, address and occupation.
A. James E. Hunt, 1272 East Alameda Drive.
Q. What is your capacity with Royal Crown?
A. Sales manager and assistant production and plant manager.
Q. How long have you been engaged in that occupation?
A. Three and a half years.
Q. Since the company was formed?
A. About two months after it was.
Q. Could you tell the court when you were first notified and by whom that Royal Crown Cola had put Royal Crown Bottling Company on a quota?
A. There was two different conversations on the 9th.
Q. Of what month?
A. August.
Q. Tell us what that conversation was and with whom?
A. I had four orders in for products.
Q. When you say four orders, what do you mean?
A. Four truckloads of Royal Crown products.
Q. Orders?
A. Orders, right.

Q. Okay.

A. One was delivered on—

Q. What day?

A. That would be the 9th.

Q. All right.

A. The next order was due the next day. I believe it was due late at night on the 9th, but for some reason we were going to accept on the 10th. I waited for the order; it didn't arrive so I called. It didn't arrive so I contacted the 7-Up plant and they informed me that we had been put on a quota.

Q. Prior to that time, had you ever been notified that Royal Crown Cola had put you on a quota?

A. That is my first knowledge of the quota.

Q. Between the date of August 10th and September 1st, did you receive any deliveries from 7-Up?

A. None.

Q. Do you have outstanding orders with 7-Up?

A. Yes, sir.

Q. When was it that you were informed of the quota for September?

A. I would say it was about one o'clock, September 1st.

Q. Was that one o'clock after we were here for our last hearing on our Temporary Restraining Order application?

A. Yes, sir.

Q. Prior to that time, had you sought to determine what the quota was for September?

A. I believe I talked to 7-Up and they said I—I did call them to find out and they didn't have a quota.

Mr. Brega. Nothing further.

The Court. Cross examination, please?

Mr. Wallace. Yes, sir.

CROSS EXAMINATION BY MR. WALLACE

Q. Mr. Hunt, when was the first time you heard you might be placed on quota?

A. August the 9th.

Q. No, sir, I think you misunderstood. Not when you heard you were on quota, but when you might be.

A. August the 9th is when I heard.

Q. Please, when was the first time you had knowledge you might be placed on quota?

A. August the 9th; that is the only time I ever heard about it.

Q. Had you ever discussed it with Mr. Alden, the possibility that there might be a quota prior to August 9th?

A. No, I did not.

Q. You indicated that you called up 7-Up in Denver to inquire as to the quantity of the September quota and weren't able to get an answer, sir? Did you make any inquiries to Royal Crown Cola Company as to whether there was a quota?

A. No.

Mr. Wallace. I have no further questions.

The Court. Anything further of this witness?

Mr. Brega. Nothing, Your Honor.

The Court. Do you have further testimony?

Mr. Brega. Nothing further, Your Honor.

The Court. Let's go ahead, please.

This completes the plaintiff's case.

Mr. Wallace. We would like to call our first witness, Mr. John Norton.

John S. Norton, called as a witness on behalf of the defendant, after being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALLACE

Q. Sir, would you state your full name, pelase.

A. John S. Norton.

Q. Your home address, please?

A. No. 2 Pinecrest Circle, Chico, California.

Q. What is your occupation, sir?

A. I am the owner, president and general manager of Royal Crown Bottling Company of Chico.

Q. Could you describe very briefly the general nature of that company's business?

A. We manufacture, distribute soft drink beverages in a franchised territory from Sacramento to the Oregon border. The brands include Royal Crown beverages and Dr Pepper, Squirt, Hires, Canada Dry, Orange Crush.

Q. What is the population of your franchise area?

A. Approximately 350,000 people.

Q. Would you state approximately how much money is invested in your business?

A. I personally have invested through capital or loan commitments in the neighborhood of $600,000.

Q. Would you describe, sir, the manner in which you distribute Royal Crown products within your territory?

A. We sell Royal Crown company's products in the conventional manner in that we have pre-sales organization in three-fourths of our territory. The product is sold by the salesmen and delivered the following day off the route truck direct to the retail outlets. A third of our territory—the other third is route selling basis. In other words, the delivery man is salesman and other portions are handled through a distributor arrangement in the mountains when they in turn deliver directly to the retailer.

Q. Does your company engage in any advertising?

A. Considerable.

Q. Would it use newspaper advertising or TV?

A. We use all types, newspaper, radio, television, point of sale. The entire spectrum of the advertising field is used to our plant.

Q. Is a portion of this advertising paid from funds from your company?

A. That is true, a greater portion.

Q. Would you say the amount of money expended by advertising by your company is substantial?

A. One hundred fifty thousand dollars is substantial and annually that is what we spend.

Q. Mr. Norton, would you explain very briefly what you understand your franchise from Royal Crown represents?

A. My franchise——

Mr. Brega. Object, if the court please; that is calling for a statement. It is a self-serving declaration and there has been no foundation laid what his franchise is.

The Court. Let's find out what the franchise is and then the court will allow him to explain.

Q. (By Mr. Wallace.) Sir, would you state what kind of franchise you have, sir? What it is you have with Royal Crown Cola Company?

A. We have a contractual arrangement with Royal Crown Cola Company to manufacture and distribute their branded products within a geographical territory which includes basically north of Sacramento to the Oregon border. We have the exclusive right to sell these brands in that particular territory to the retail trade and/or consumers in that territory.

Q. Now just to make sure that we understand exactly what you mean, what do you mean by exclusive rights, sir?

A. Well, it is our understanding that this contract gives us and by us I mean Royal Crown Bottling Company of Chico, the only person—individual corporation, the right to sell these brands in that territory and does not give an outside party that right.

Q. Sir, when did you first invest or purchase your company?

A. I became first associated with Royal Crown in 19—of Chico in 1964. I purchased the business myself in 1970.

Q. Now, in connection with your decision to purchase that business was one of the considerations in your mind the fact that it was an exclusively licensed area?

Mr. Brega. I object to the question. I also object to any further testimony in this regard. It is not material to the issues in this case.

The Court. Overruled. The court will allow it.

A. (By the witness) By all means, there is a definite value put on our franchise. This value has been created over the years by diligent efforts of people associated with this business, myself included, and has built an image in an area that has considerable monetary value to the people involved.

The Court. Now what relevancy does that have to this inquiry, please?

Mr. WALLACE. I was—I really have completed the line, Your Honor, but I will be happy to——

The COURT. Is this year last question?

Mr. WALLACE. On that line, yes sir.

Q. (By Mr. Wallace) Mr. Norton, in your market, are Coke and Pepsi substantial factors?

A. You better believe it.

Q. Do you find in your market difficulty in achieving shelf space in the large super markets?

A. Well, let's put it this way. The soft drink industry particularly in our territory is extremely difficult to acquire some store shelf space due to the tremendous volume that Coke and Pepsi and 7-Up do in our territory and it is a job that we spend constantly everyday of our working life working towards.

Q. Do you consider the personalized service of route salesmen important in achieving a satisfactory market position in your markets?

Mr. BREGA. I would like to object to the leading type of question we have been going through.

The COURT. It is a leading question. Let's not suggest an answer.

Mr. WALLACE. I was trying to expedite things, Your Honor.

Q. (By Mr. Wallace.) Would you state for the record, please, Mr. Norton, the principal functions of your route salesmen or advance salesmen, sir?

A. Well, our advance salesmen, number one, are paid on the basis of a straight commission period and by that I mean they are paid eight cents per case on every case that they sell of our brand in our franchise from case one. There are no guarantees involved of any nature as far as their income. It is predicated one hundred percent on their ability to acquire the necessary shelf space which in turn will result in the sales of soft drinks. To tie in with it, we have the delivery end of this spectrum which is the delivery salesman. He is paid on an hourly basis, eight hours a day, forty hours a week and in addition to that we set up incentive contests for him to encourage the delivery man to perform relative selling functions such as neatness of stacking the beverages on the gondola, become acquainted with the store personnel as far as the backroom clerks are concerned, things of this nature. It is a combination of both spectrums of preselling and the delivery end that makes our business successful.

Q. These functions you have just described, sir, does it cost your company—could you estimate approximately what percentage of your operating expenses——

A. Our delivery expenses would be classified as probably the number one cost item. We have included into delivery expenses the wages of the drivers.

Q. I didn't want to get into sensitive data, just perspective.

Sir, have products of canned—Royal Crown products manufactured by Royal Crown Bottling Company of Denver, Colorado, been shipped to the area of your exclusive license?

A. They certainly have.

Mr. BREGA. I object and move it be stricken unless there is foundation of his own knowledge.

The COURT. Let's see the basis.

Q. (By Mr. Wallace.) What is the basis of your response to that?

A. This first occurred—was first brought to my attention on June 5 of 1972, whereby one of our salesmen picked up a sales bulletin that had been put out by United and McDowell Warehouse in Sacramento announcing the availability of Royal Crown and Diet-Rite cans.

Q. How do you know this?

A. I physically saw the bulletin.

Q. You read the bulletin?

A. I read the bulletin. Next, because of reading this bulletin, I decided that this was totally out of line. It had been announced, but there was—it had already taken effect. We had received the bulletin on Monday the 5th of June and this was effective either on the 5th or 6th that these cans were going to be available through United Grocers Warehouse in Sacramento and our area is supplied by their grocery needs, say 75 percent by United Grocers out of Sacramento.

Q. Could you be specific as to whether you actually had seen the canned product in your area?

A. Then I alerted our sales personnel of the forthcoming problem and would they please advise me on a daily basis as to when cans were going to start arriv-

ing into different stores in our territory. Over a nine week period, starting the 5th of June, I documented it which I have with me a list of stores which were buying cans directly from United Grocers in our franchised territory and I needless to say have heard many comments from our salesmen as to what this is going to do to them on the eight cent a case commission.

Mr. BREGA. I have to move that be stricken.

The COURT. Strike that. Let's hear what you documented, please.

A. (By the witness.) I shall read to you a list of stores that during this nine week——

Q. Summarize this for us, please?

A. We have got let's say 50 stores handling RC and Diet-Rite through United Grocers, that 50 stores during the nine week period sales approximated roughly 4,500 cases of cans we would have sold.

Mr. BREGA. Object, Your Honor. That is strictly hearsay from this witness. He has no foundation for that testimony.

The COURT. Let's find out how he bases it and then the court will——

A. (By the witness.) It is very simple. We have a route card on every account that we service and on this route card is noted the package size, flavor, so on and so forth that we sell to the account that the salesman takes with him when he enters an account so that he not only knows from being there, what products they handle and what they don't handle, if he should happen to forget he has a record with him that he can look at. When an account is buying RC Diet-Rite cans from us, and then they tell him they are no longer going to buy and they are buying from United and there is a stack of cans sitting on the floor which we did not sell, this is pretty good evidence that it came from somebody other than ourselves.

The COURT. Do you know their source?

The WITNESS. We attempted to track it down where the cans were coming from and feel that to the best of our knowledge——

The COURT. I would like rather than a collective type of judgment or evaluation, let's see what is the basis of your testimony that you feel might have emanated from that source or this source.

The WITNESS. Because I made a few telephone calls to find out where these cans were coming from and found it was the Denver market.

The COURT. These are customers of yours?

The WITNESS. These are business associates so on and so forth.

Mr. BREGA. I move that the testimony be stricken because there is no foundation.

The COURT. Sustained. It will be stricken and disregarded by the court.

Mr. WALLACE. Just a few more questions and be specific and keep your answers brief.

Q. (By Mr. Wallace.) What has been the effect on your operations from these outside canned products coming in your exclusive area?

Mr. BREGA. I object to the question. It hasn't been causally related to the plaintiff in this case.

Mr. WALLACE. It was my understanding that Mr. Alden wasn't really contesting his products were going to California.

The COURT. I am going to allow it. I am going to allow it subject to being connected up.

Answer the question.

In fairness to the witness, please rephrase the question, please.

Q. (By Mr. Wallace.) Sir, would you state whether you have noticed any effect on your business profitability as a result of these out of state shipments?

A. There is no question in my mind they have damaged us because of the shipment of cans into our franchised territory. For example, we will sell in a calendar year of Royal Crown Diet-Rite cans, approximately 25 to 30,000 cases of cans. Now keep in mind, we are a small geographical area in terms of population and that number of cans represents a substantial piece of our business; approximately—probably ten, eleven percent of the Royal Crown business total would be those cans. We can pinpoint some 4,500 cases of cans coming into our territory during the nine week period which represents approximately 20 percent of our total volume. Now keep in mind that most of these cans—sales are done during the summer months and that is the time this started up.

The COURT. It is your testimony that Royal Crown cans or products from other than your manufacture did surface in your district or territory; is that correct?

The WITNESS. There is no question.

Q. (By Mr. Wallace.) Has it had an adverse effect?

A. (By the witness.) From the standpoint of volume of sales in this, it carries on into reduction of payroll to salesmen who are on an eight cent a case commission: it goes into a situation we have invested thousands of dollars of coolers to be placed——

Q. It has had an adverse effect?

A. No question about it.

The COURT. Next question. Try to confine your answers to the question.

Q. (By Mr. Wallace.) During this nine week period that you just described to the court, did your company continue to spend money on advertising in your exclusive area, sir?

A. Yes, we did.

Q. Mr. Norton, the 4,500 cases that you described in your area, have you physically seen any of this product or is——

A. Yes, I have.

Q. Would you describe for the court the appearance of the product that you saw?

A. Displayed in the stores, quite a few extra displays.

Q. You misunderstood. Just focus on one case of a product. Will you describe for the court the way it is packaged?

A. Six-pack carton cans of RC Diet-Rite in our territory, I can't recall whether there were any loose cans or not. By loose cans, I mean 24-pack to a case. If I had a can in front of me, I could show you.

Q. Are the cans identical in trademarks?

A. No, they are not. They have got identifying marks on the cans. It is from—packed by 7-Up, Denver or something like that. It is not our cans from Thornton, California, canners. It says on there, "product of Royal Crown Cola, packed Thornton, California," or something like this. These says something other than what I have just described to you. From memory, I can't tell you exactly, but it's not from our territory.

Mr. WALLACE. I have no further questions.

CROSS EXAMINATION BY MR. BREGA

Q. Mr. Norton, how did you find out about this case in Colorado and the hearing today?

A. Well, it's pretty obvious to me when these cans first arrived in our territory——

Q. Just how did you find out about the hearing today?

A. Well, I was trying to answer that question.

The COURT. Perhaps a little more directly. Did somebody tell you?

A. (By the witness.) Yes.

Q. (By Mr. Brega.) Royal Crown Cola Company—who from the Royal Crown Cola Company called you?

A. I received several calls, one from Reed Sinclair and one from Bob Wolf. As to this exact hearing, I believe the call was received from Bob Wolf.

Q. They asked you to appear out here?

A. Yes, they did.

Q. Is your company on quota?

A. No, it is not.

Q. Have you ever been on a quota?

A. No, there is no need for us to be put on a quota.

Q. Do you sell to warehouses in California?

A. We do not.

Q. Do you sell to supermarket chains?

A. We certainly do.

Q. For instance, do you sell to Alpha Beta?

A. Alpha Beta is in southern California.

Q. Do you?

A. No.

Q. Did you sell to Safeway?

A. Yes.

Q. Now, does Safeway have stores outside of your franchised area?

A. Yes.

Q. Do you sell to Statler Brothers?

A. No.

Q. Do you sell to Spartan?
A. No.
Q. Certified Grocers?
A. No.
Q. United Grocers?
A. No.
Q. What supermarket chains do you sell?
A. We have our own local supermarket chains. The largest being Safeway, the second largest Wentz' Market, the third being Farmers and then Millers; that encompasses the bulk of our chain stores, the large independents.
Q. Do many of those sell outside of the franchised area, many of those stores?
A. Very few do.
Q. Now are the Royal Crown products that are coming into your area being sold at the same price as yours?
A. No, they are not.
Q. Are they being sold at a cheaper price?
A. Yes, they are.
Q. One of the reasons people are purchasing then is that they can purchase cheaper from an outside bottler than from your own facilities in California?
A. In this particular instance, yes.
Q. One of the reasons you are complaining is their prices are lower than yours?
A. They don't have the overhead we have, the marketing factors.
Q. Just say yes or no, please.
Mr. WALLACE: I would again object to this line of questioning because the question before Your Honor is really whether Mr. Alden is entitled to legally compel Royal Crown products for him to ship to California and other places. I don't know that the pricing structure really relates to that question of Mr. Alden's legal theories.
The COURT: Your objection will be noted. The court will allow the question and the answer, please.
Let's have a yes or no answer.
(Whereupon, the reporter read the last question back.)
A. (By the witness) Yes.
Q. (By Mr. Brega) Have the Royal Crown Cola Company given you a promotion discount recently in California for the sale of their franchised products?
A. No.
Q. Have they in the last year?
A. No.
Q. Have they since you have had the franchise agreement?
A. We have an advertising budget which is mutually agreed upon and the funds are sent according to that agreement. Our agreement is the same as everybody elses.
Q. The $150,000 you then talked about for advertisement, does Royal Crown Cola Company pay for part?
A. That is my one hundred percent expenditure.
Q. How much of that was for RC?
A. Probably $100,000 plus.
Q. Now, isn't it a fact that Royal Crown, the drink in a can, has only on the can, "Royal Crown Bottling"?
A. "Royal Crown Cola, Columbus, Georgia" on the can.
Q. I want you to tell us if you will exactly what the cans say that are out of Denver?
A. I can't do that. I can't recall.
Q. Tell me how you identify that as being from Denver?
A. It is something different from what our cans say. We normally order through Thornton which is California canners.
Q. Tell me what is the difference?
A. It's a different name.
Q. What name?
A. I don't recall.
Q. What name does your can have on it?
A. It's packed under the authority of Royal Crown Cola Company, Thornton, California, or something like that.
Q. You then say that these say they are packed under the authority of somebody in Denver?
A. I believe so, yes.

Q. It says, "Denver, Colorado"?
A. I believe so, I am not sure.
Q. How did you identify this coming from Colorado?
A. It's different from what the cans you purchase from Thornton.
Q. Does it say, "Colorado"?
A. I believe so.
Q. You mean you can't remember if it says—
A. No, I cannot remember.
Q. Can you remember if it says, "Denver"?
A. I can't remember.
Q. But you know full well that it is Colorado?
A. I am not sure whether it is Colorado or Denver. I believe it is one or the other, I believe. I am not sure.
Q. You are not even sure if it says, "Denver" or "Colorado"?
THE COURT: Next question please.
Q. (By Mr. Brega) Now, isn't it a fact that you have difficulty in the California area with franchisees selling in other territories?
A. In my territory?
Q. I just said in California.
A. Problems have come up, yes.
Q. You are aware of the fact they are sold as far away as Reno?
A. No, I am not.
Q. How about Las Vegas?
A. I am not aware of where the problems have been specifically except there have been some problems.
Q. In California?
Mr. Wallace. This line of questions seems quite similar to the line propounded to Mr. Alden and the court ruled it is not really the crux of the problem before the court.
The Court. Let's go ahead, please.
Q. (By Mr. Brega.) If you lose shelf space in the store, I presume you consider that to be a serious problem?
A. Very serious.
Q. If a franchisee loses shelf space, it is very difficult to get back?
A. Yes, it is.
Q. If you lose your truck drivers, it is difficult to get these back?
A. Yes, it is.
Q. If you have your trucks out of operation, it is very difficult to have your operation run smoothly and efficiently?
A. This is true.
Q. Has Royal Crown Cola suggested to you that they are going to put you on a quota?
A. No.
Q. Have you ever discussed with them selling outside of the franchise area?
A. No.
Q. Have you testified for them in front of any Federal agencies?
A. No.
Q. You own any stock or have any relationship with Royal Crown Cola in any way?
A. No.
Mr. Brega. No further questions.
Mr. Wallace. No further questions.
The Court. I would like to excuse this witness, but I want to be sure that there is no necessity for him to remain. Any additional questions?
You may remain or leave as you see fit.
The Witness. I must leave.
The Court. I will ask the attorneys to approach the bench if they will, please.
(Whereupon, discussion was held off the record.)
The Court. Mr. Howell, you are the same Mr. Howell that testified before? You are the son of the General Manager of 7-Up: is that correct?
Mr. Howell. Yes, sir.
The Court. You testified before this court in regard to the fact that you are a manufacturer of the product of Royal Crown Cola?
Mr. Howell. Yes, sir.
John B. Howell, recalled as a witness, having previously been sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALLACE

Q. What identifying mark or marks would there be in the products that you manufacture for Royal Crown?

A. The can itself would bear something that says to the effect manufactured by or distributed by the Royal Crown Cola Company, Columbus, Georgia and probably a zip code.

Q. Does it have anything to do——

A. That identification has nothing to do with Denver.

Q. Anything about the 7-Up Company on there?

A. No, sir.

Q. Is Denver identified or the state in any way?

A. No, sir, the only way that it could possibly be identified is by a code that is placed on the bottom of the can.

Q. Nothing in words?

A. No, sir.

The COURT. Any other questions?

Mr. BREGA. No.

Q. (By Mr. McKinlay.) What about the case?

The COURT. What about the case? Would there be anything on the shipping case where the cans are included?

The WITNESS. Nothing from Denver. It would say several things on the visible portion. On the side of the case, it would bear two identifying marks, one on the side and one on the end. Both are different. One says "a product of the Royal Crown Cola Company" and I think on the end panel it says, "a product of RC."

The COURT. Anything have to do with Denver, Colorado?

The WITNESS. The bottom of the tray would say only where the tray itself was manufactured. What we produce, they are manufactured by the International Paper Company in Kansas City, but nothing about Denver.

The COURT. Nothing about Interstate or General Beverage?

The WITNESS. No, sir.

The COURT. Nothing about Royal Crown of Denver; is that correct?

The WITNESS. That's correct.

The COURT. Any further questions of this witness?

Mr. BREGA. Nothing further.

The COURT. I appreciate your presence and the fact you have stayed here.

Mr. WALLACE. Mr. Wolff, please.

Milford G. Wolff, called as a witness on behalf of the defendant, after being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALLACE

Q. Mr. Wolff, would you state very briefly your name, your present occupation and in about 2 minutes your prior experience in soft drinks.

A. Milford G. Wolff. I was vice-president of field operations for the west with Royal Crown Cola Company. I have been responsible for carrying on our business activities with franchised bottlers in the western part of the United States.

Q. Could you state the number of years you have been involved in the soft drink business?

A. I have been in the soft drink business since 1939, so that makes it—well, 33 years.

Q. Have you also been with Coke and Pepsi in various capacities?

A. Yes. I was with Coca-Cola Company and Pepsi and I was with company owned plants. I managed various bottling plants, both bottling plants and combines with Pepsi Company. I was with them for 9 years; vice-president in charge of field operations at the time I left that company.

Q. Mr. Wolff, would you summarize very briefly the obligations which Royal Crown expects its exclusive licensees to live up to in developing and servicing an area?

Mr. BREGA. I object to that question. I think the contract speaks for itself and I believe the contract is what the terms embodied. Anything more would be purely speculaion by this witness.

Mr. WALLACE. I am not directing to an interpretation of the contract, but the meaning of the overall relationship.

The COURT. The court is going to allow it so long as it doesn't deviate from the terms of the contract.

A. (By the witness.) The bottler or parent companies expect of the bottler a product that is produced up to those standards that are established by the company, that the bottler use packaging, advertising and materials that are approved by the Royal Crown Cola Company and that the bottler diligently or that the bottler use the usual efforts available to him to promote and develop those products of Royal Crown Products that are franchised to him in the franchise area designated.

Q. Cultivation of accounts within the area?

A. Yes.

Q. Would that include relatively frequent visits to these accounts to insure they are being adequately serviced?

A. Very briefly, yes. It takes frequent service to build a business. It takes frequent contact with the customer.

Q. Mr. Wolff, have you been to Denver before, sir?

A. Yes.

Q. Have you observed the soft drink—the overall soft drink situation? By that I mean, have you been in the stores to see what is in the market place?

A. Yes, over a period of years.

Q. Have you also seen statistics regarding the volume of soft drink sales within the Denver area?

A. Yes. We use this. In most markets, local research material is made available to us for instance or made available to all business people in the area and in the case of Denver, The Denver Post puts out a yearly consumer survey that gives very strong indication of the relative position of the product in the market and———

Q. Consumer acceptance of the product. Would Denver be considered one of the more significant potential markets for soft drinks?

A. Denver is one of the most significant market potentials in the U.S. It is a fast growing market; the economic conditions are good; the competitive climate in Denver—that is by competition, there are degrees, but there is probably less restrictive price cutting activities going on in Denver than any other major market in the United States.

Q. Sir, on the basis of your knowledge, is the share of the soft drink business in the Denver area which Royal Crown has higher or lower than in other markets similarly situated?

Mr. Brega. Objection to the question, Your Honor, on the basis that from his previous testimony, he would have obtained that from the survey figures from the Denver Post.

The Court. This testimony is used everyday by businessmen to make very valid judgments and advice. These are well recognized exceptions to the hearsay rule. We know the Denver area is different than any other part of the country.

Mr. Wallace. I have one further question.

Q. (By Mr. Wallace.) Mr. Wolff, on the basis of your information, would you describe the relative situation involving Royal Crown in the Denver Market as good, bad or indifferent?

A. Extremely bad.

Q. Has the situation improved or deteriorated since January 2, 1969?

A. We are selling less than half of the Royal Crown products that was previously sold in this franchise even though the population was less. In other words, the bulk of the volume of the sales is less than half for the brand Royal Crown even though the potential for the market has increased considerably since that time.

Mr. Wallace. Two more questions and we are through, Your Honor.

Q. (By Mr. Wallace.) Mr. Wolff, would you describe approximately how many exclusively franchised bottlers Royal Crown has in the country?

A. There are 313 franchises of which about 9 are company owned.

Q. Do you consider the continued viability of these franchise important to your company?

Mr. Brega. Objected to as obviously self-serving.

The Court. Sustained.

Q. (By Mr. Wallace.) Mr. Wolff, would you describe whether you have any opinion as to the effect on your other franchisees if the relief Mr. Alden has requested is granted?

Mr. Brega. It is calling for speculation if he is entitled—that is what the relief is and not what is happening on the east or west coast. This agreement is in violation of the statutes of the United States itself.

The Court. Overruled. You may answer the question, please.

A. (By the witness.) To allow unrestricted release of canned products RC Cola Company produces into other bottlers franchises would severely handicap their effort to develop their enterprise and it will do it in several ways. For one thing, the dealer does not like to buy a product from two sources and the dealer—the local bottler loses the account for his products for all his products if the cans come in. Also the effect of the small bottler more than the large bottler as a rule, the amount that goes in relative to the sales volume is usually greater and the small bottler is having a greater struggle in maintaining the profitability and viability of his franchise. It is a struggle and this is well known today.

Q. Mr. Wolff, would you describe the effects of that situation which you just testified to on your company, Royal Crown Cola Company?

A. Well, it affects us directly because the bottler loses confidence in trying to develop the brand in his own territory. If he can't sell the products there and he is the only one who provides the advertising and merchandising activity whether it's in Boise, Idaho or Chico, California, no one from Denver comes into help merchandise those brands. So it is a free ride on the merchandising activities and work that has been provided over the years by the local franchisee.

Mr. Wallace. No further questions.

CROSS EXAMINATION BY MR. BREGA

Q. Mr. Wolff, wouldn't you say it is better for the public to be able to buy Royal Crown Products at a cheaper price and I believe that can be answered yes or no.

A. Yes.

Q. Wouldn't you say that it is better for the public that competition has a tendency to make pricing go down?

Mr. McKinlay. I object to this line of questioning unless this is a course in sociology or——

The Court. The court will allow it. Overruled.

Q. (By Mr. Brega.) Isn't it your experience that competition has a tendency to lower prices?

A. Yes.

Q. Don't you think that the franchise should have the choice of selling the products to whomever or wherever he can?

A. No.

Q. The company's position is that the franchisee should stay within the strict confines of the territory; is that correct?

A. Yes.

Q. The company takes that position whether these contracts are legal or illegal; is that their position?

Mr. Wallace. Could I object to that question, please, unless some foundation——

The Court. Rephrase your question, please. I think it is objectionable in this form.

Q. (By Mr. Brega.) You stated what the company's position was here on several items. I am asking what the company's position is on a franchise agreement if the territorial restrictions are found to be illegal?

A. I don't believe they have been found to be illegal as relates to—directly to the soft drink industry.

Q. Has anyone brought action against Royal Crown Cola prior to this time on this particular issue?

A. Yes.

Q. Where was that suit brought?

A. I believe in Washington.

Q. Is that the FTC matter that you have pending now?

A. Yes.

Q. Do you place all of your franchisees on a quota?

A. No.

Q. Isn't it a fact the reason you put Mr. Alden and Royal Crown Bottling Company of Colorado on a quota is so that they can't sell outside of the franchise area?

A. That was one consideration.

Q. One prime one?

A. There were other considerations.

Q. Are you trying to drive them out of business?
A. No.

Q. Isn't it a fact that with a quota of 6,190 cases, he can't increase his sales?
A. That is not true.

Q. How can you increase sales if you don't have a product to sell?
A. Our figures, our research that is done locally indicates that 6,000 and some odd cases would more than take care of the needs as they are now established in the Denver market.

Q. Well, don't you want Mr. Alden to increase the need in the Denver market?
A. Yes.

Q. He can't increase the sales when he is on a quota of 6,100 cases.
A. To our knowledge, he has never used that amount in the Denver market.
Q. Did you understand my question? Let's try to answer it this time. If he has 6,100 cases, he can't sell more than that; can he?
A. No.

Q. Now, what is Mr. Alden's quota for October?
A. I don't know.
Q. What is it for November?
A. I don't know.
Q. What is it for December?
A. I don't know.
Q. Can you properly serve your customers if you lose the shelf space in the stores in the area?
A. No.

Q. Can you properly serve your customers if your trucks don't have the Cola products?
A. No.

Q. Can you properly service your franchise area if you don't have the employees to drive the trucks?
A. No.

Q. Well, I think you have answered it, sir.
The Court. Mr. Brega, I think we are going to recess at this time. Can you check with the Royal Crown people so they can be made available?
Mr. Brega. I could finish in one minute.
The Court. The court does not want to short change you on time. We will give you as much time as you need. Let's go ahead, please.
Q. (By Mr. Brega.) Now, isn't it a fact that Royal Crown Cola is in active competition with Pepsi-Cola and Coca-Cola for the sale of products all over the United States?
A. Very much.

Q. Isn't it also a fact that all of the sales are interstate commerce from state to state and all across the nation?
A. Generally, yes.

Q. Isn't it also true that Royal Crown Cola is itself a franchisee in some areas?
A. Yes.

Q. Isn't it also true that Royal Crown Cola—isn't it itself a bottler or canner?
A. Yes.
Mr. Brega. I think I have nothing further.

REDIRECT EXAMINATION BY MR. WALLACE

Q. Mr. Wolff, this federal action that you referred to in Washington, is it not only against Royal Crown Cola but a similar action against other——
A. Seven companies.

Q. Mr. Wolff, if Mr. Alden were to demonstrate to you that the Denver market within the area described in his license agreement needed more than the number of cases which he is presently being supplied with, would you be willing to supply them to him, sir?
A. Yes.

Mr. Wallace. No further questions, sir.
The Court. Will you supply to Mr. Alden all the cases necessary for ultimate sale in the Denver franchise area?
The Witness. Yes.
The Court. Thank-you, Mr. Wolff.
Anything further of this witness?

Mr. Brega. No, sir.

The Court. Thank you, sir.

We will be in recess on this case until 1:30 on Wednesday the 13th of September. Any problems with that date, please?

Mr. Brega. I mentioned I do have a matter that is starting in Denver on Tuesday and it could—

(Whereupon, discussion was held off the record.)

The Court. The court knowing the importance of this litigation will be expeditious in its ruling. The initial ruling might not be as extensive as the court will later probably go into but at least counsel should have some ideas expeditiously as to what the court's inclination is after the court has received the brief, the additional material and the court has read the deposition. Is this agreeable to you, please?

Mr. Brega. Yes.

Mr. McKinlay. Yes, sir.

The Court. I appreciate the courtesy of counsel and to the witness and litigants in this case. The court will be in recess.

(Whereupon, the court was in recess on this matter at 4:20 p.m.)

REPORTER'S CERTIFICATE

I, E. J. Carpenter, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that thereafter my shorthand notes were reduced to typewritten form under my supervision, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings in this matter on the date set forth.

DATED at Denver, Colo., this 4th day of October, 1972.

My Commission expires December 4, 1973.

E. J. Carpenter,
Official Reporter.

Coca-Cola Bottling Co. of Taft, (Inc.).
Taft, Calif., September 30, 1972.

Hon. Philip A. Hart,
U.S. Senate,
Washington, D.C.

Dear Senator Hart: I am writing this letter to reply to several points raised in a letter dated September 18, 1972, from J. Lucian Smith, President of Coca-Cola USA to you. Your Subcommittee has graciously made a copy of that letter available to me since it relates directly to my earlier letter telling you of The Coca-Cola Company's apparent retaliation against me after I testified before your Subcommittee.

There are three general areas in Mr. Smith's letter that I want to answer. These are: (1) my 150% quota, how it was established and how it is administered: (2) my telephone conversations with Mr. James Evans of the Coca-Cola Company; and (3) my relationship with Thriftimart, Inc.

First, I want to describe the origins of the quota system which the Coca-Cola has imposed upon me. Ever since January of 1971, I have been attempting to purchase large quantities of Coca-Cola syrup and canned Coca-Cola products to supply certain large warehouse customers in my territory who intend to resell the product in Los Angeles and in other areas outside of my franchised territory. The Coca-Cola Company has refused to fill many of my orders, and this has resulted in my filing an antitrust action against them in the United States District Court for the Central District of California (The Coca-Cola Bottling Company of Taft v. The Coca-Cola Company, Civil Action No. 71–270–LTL). From January, 1971, through August, 1971, the Coca-Cola Company refused to honor most of my orders, but they did fill some orders, apparently on a random and arbitrary basis. Finally, in August, 1971, I was informed by the manager of Coca-Cola's San Leandro California Canning plant, a Mr. Gibson, that the company had turned over to Mr. Gibson, Mr. Bob Daniels, the manager of the company's Los Angeles syrup plant and Mr. Don Wilson, who I believe is the supervisor of both Mr. Gibson and Mr. Daniels, the problem of determining how much syrup they would sell to me. These men concluded that I should be limited to a quantity of syrup each month equal to 150% of the quantity of syrup which I purchased during the corresponding calendar month of 1970. The quota as originally de-

scribed to me and as always applied since then has been on a month-by-month basis, and has never been on an annual basis. Details of how the quota was established, which I have summarized above, were included in my affidavit dated August 16, 1971, which was filed in my antitrust suit against The Coca-Cola Company. A copy of my affidavit is enclosed with this letter.

I have tabulated my purchases of syrup from The Coca-Cola Company on a monthly basis since January, 1970. In each of these months I have purchased every drop of syrup which the Company was willing to sell to me. Ever since they told me they were limiting my syrup supply, I have made a practice of asking them every month how much syrup I could have, and I have purchased the amount they determined to give me. The first table shows the purchases of only Coca-Cola syrup, and the second table shows the total syrup purchases (Coca-Cola plus Fresca, Tab, Simba, Sprite and Fanta syrup).

Month	1970, gallons	1971, gallons	Percent increase or (decrease) for month	1972, gallons	Percent increase or (decrease) for month
Cocal Cola sirup:					
January	540	1,019	89	888	64
February	324	378	17	594	83
March	594	1,158	95	1,188	100
April	648	864	33	1,134	75
May	432	725	68	864	100
June	810	617	(24)	2,349	190
July	648	1,281	98	1,521	135
August	756	1,073	44	1,073	42
September	540	926	73		
October	540	501	(7)		
November	432	756	75		
December	432	641	63		
Total	6,696	9,939	48	9,611	102
Total sirup:					
January	565	1,073	90	1,020	80
February	486	403	(17)	648	33
March	594	1,416	138	1,296	117
April	838	1,174	40	1,134	35
May	511	1,314	157	918	79
June	1,087	1,236	14	2,376	118
July	838	2,520	201	1,653	97
August	885	1,402	58	1,073	21
September	635	1,815	185		
October	635	1,121	76		
November	505	795	58		
December	505	772	52		
Total	8,084	15,041	86	10,118	74

These tables clearly show that the announced "quota" allowing me a 50% increase has not even been loosely enforced. For instance, if the quota is based on Coca-Cola syrup alone, on a month-by-month basis, my Coca-Cola syrup purchases as limited and determined by the Company have ranged, for no reason ever revealed to me, from a decrease of 24% to an increase of 190%. During the entire year of 1971, my Coca-Cola syrup purchases were up 48%, and during the period of January 1 through August 31, 1972, my Coca-Cola syrup purchases when compared to the corresponding period in 1970, are up 102%. If my quota is based on the total syrup purchases during the time period in question, the monthly figures have varied from a decrease of 17% to an increase of 201%. On that basis, in 1971, I had an increase of 86% and so far this year have had an increase of 74%. From these tables, I think it clear that the Coca-Cola Company has not in the past made any consistent, intelligent attempt whatsoever to enforce the 50% increase quota. My purchases were determined solely by the Company, and they never told me that they were allowing me to draw any excess against a yearly quota.

Considering these figures, it seems an extreme coincidence that, 10-days after I testified before your Subcommittee I was "reminded" by Mr. Evans that my 1971 quota was for only 12,126 gallons of syrup and that I had a remainder of only 2,202 gallons in the unfilled quota for the rest of the year. It strains credibility even further to believe that, approximately 2-weeks later, the Company learned that, because of "administrative errors", I received more than my quota in 1971, and then decided that, out of "fairness" to me, the Company would now

change my 1972 quota to be equal to the actual 1971 purchases, plus a 7% growth factor.

I believe it is obvious what really happened. There is simply no believable explanation for the sudden cut-off of my syrup except that the Company was unhappy with my testimony before our Subcommittee. The Company's abrupt change of position probably occurred when some cooler person heard about the situation and immediately recognized the outrageousness of this kind of retaliation against a witness for testifying before your Subcommittee. The only unanswered question is whether or not the Company changed their position after they heard of my letter of August 29 to you complaining about their retaliation, or whether they realized on their own that their earlier high handed actions (which they are accustomed to using in dealing with any nonconforming bottlers) were an affront to the Senate and must be stopped. I do not believe it really too important which factor motivated the change of position.

Mr. Smith's letter of September 18, 1972, can now be seen for what it really is. It is nothing in the world but an artfully worded and clever rationalization after the fact of the company's initial crude attempt to express their displeasure with me and their subsequent attempt to whitewash that retaliatory act. His letter attempts to do this by manufacturing, long after the fact, a nonexistent annual quota of 12,126 gallons of syrup. If there ever was such an annual quota of 12,126 gallons, they certainly kept it a secret from me.

Next, I want to reply to the statement on page 4 of Mr. Smith's letter, that Mr. Evans did not make the "I am only following orders" statement attributed to him by me. As far as I am aware Mr. Smith was not a party to the telephone conversation between Mr. Evans and myself, nor did he overhear it. Obviously, I was a party to that conversation, and I repeat that Mr. Evans did make the statements which I attribute to him. I am perfectly willing to testify to this under oath at any time and place that is convenient to your Subcommittee .

Finally, I want to comment upon my relation with Thriftimart, Inc., Mr. Smith, in his letter, has adopted the sly inunendo "Thriftimart-Taft" to imply that my dispute with his company is somehow merely a business dispute between two giant entities. This is not the truth, and Mr. Smith knows it is not. At the time I began my fight with the company, I had had no business dealings whatsoever with Thriftimart, and did not know a single person at that company. It was only many months after my litigation with The Coca-Cola Company had begun that I had my first contact with the Thriftimart people, which contact eventually led to the sale by me of 51% of the stock of my company to Thriftimart. Prior to that time, my family had operated our business in Taft, California, since 1935. The sale, as far as I am concerned was a necessity forced on me by the actions of The Coca-Cola Company.

Ever since the sale of the stock of Thriftimart, I have continued in complete charge of the operation, and am the Chief Executive Officer of the Company. As such, I am responsible only to the Board of Directors, which still consists entirely of members of my family. Thriftimart has no representation on that Board and has been a completely passive investor in the Company. I did not really wish to have to sell any part of my family business to another party, but I was forced to do so by extreme economic pressure when The Coca-Cola Company began their illegal activities against me and attempted to drive me out of business. The Coca-Cola Company is fully aware of the financial relationship between me and Thriftimart, Inc., since they have taken both my deposition and the deposition of Robert Laverty, President of Thriftimart, Inc., at some length in the above mentioned litigation. Having forced me to sell part of my business, it is less than candid of them to attempt to portray my opposition of their tactics as motivated by any relation with Thriftimart. It is well known to them that the relationship did not come about until long after I had begun my fight against their antitrust violations.

I hope that this letter is helpful to you in understanding and appreciating The Coca-Cola Company's apparent attempts to harass me after testifying before your Subcommittee. I would appreciate it if you would make this letter a part of the record along with Mr. Smith's, and if you desire additional information or if you would like me to testify on the facts in this letter, I would be more than willing to do so. I am sorry I am unable to deliver this letter to your office in person as Mr. Smith did his, but I do not have sufficient staff to operate my small business in my absence, and cannot afford such trips to Washington. I also do not have a public relations staff to construct elaborate explanations of administrative error in an effort to excuse acts of sheer economic ruthlessness and corporate arrogance.

Very truly yours,

W. P. FOSTER.

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

(Civil Action No. 71–270, Third Affidavit of William P. Foster)

(Reagin and Braunstein, Attorneys at Law, Los Angeles, Calif., Attorneys for Plaintiff)

THE COCA-COLA BOTTLING COMPANY OF TAFT, (INC.),

PLAINTIFF,

vs.

THE COCA-COLA COMPANY, A CORPORATION, AND CANNERS FOR COCA-COLA BOTTLERS, INC.

DEFENDANTS

WILLIAM P. FOSTER, being duly sworn, deposes and says that:

1. I am President and Chief Executive Officer of plaintiff, THE COCA-COLA BOTTLING COMPANY OF TAFT, (INC.), (hereinafter, TAFT).

2. It is the business of TAFT to purchase Coca-Cola syrup from defendant THE COCA-COLA COMPANY (hereinafter, COCA-COLA) to use that syrup to bottle and sell Coca-Cola products in bottles and to obtain canned Coca-Cola products from defendant CANNERS FOR COCA-COLA BOTTLERS, INC. (hereinafter, CANNERS) for sale to its customers.

3. TAFT obtains canned Coca-Cola products from CANNERS under a Canning Agency Agreement under which CANNERS purports to be the agent of TAFT to provide canning services for TAFT. A copy of that Agency Agreement is attached as Exhibit 1 to this Affidavit. The form of that Agency Agreement was determined by COCA-COLA, who also approved the Agreement. As in stated in paragraph 5 of the Affidavit of Walter L. Susong, Vice President of COCA-COLA, already on file in this action, CANNERS is a wholly-owned subsidiary of COCA-COLA. When TAFT orders canned Coca-Cola products from CANNERS, CANNERS ships the product to TAFT. COCA-COLA bills TAFT for the syrup used in the shipment plus the cost of other materials, such as cans and cartons. As a "convenience" to TAFT, COCA-COLA also bills TAFT for the processing fee charged by CANNERS and for freight charges for transporting the canned Coca-Cola products from CANNERS' plant to TAFT'S plant. A typical invoice to TAFT from COCA-COLA for a shipment of canned Coca-Cola products is attached as Exhibit 2 to this Affidavit. TAFT exercises no control over the operations of CANNERS, which is totally controlled by its parent corporation, COCA-COLA. In fact, CANNERS is in no way an agent of TAFT but is instead, the vehicle through which COCA-COLA sells canned Coca-Cola products to bottlers such as TAFT for subsequent distribution by the bottler.

4. TAFT obtains the Coca-Cola syrup which it uses to bottle Coca-Cola products from COCA-COLA'S Los Angeles syrup plant. TAFT is required by its Bottler's Contract to purchase all of its Coca-Cola syrup from COCA-COLA. However, even if TAFT were free to purchase syrup elsewhere, there is no other source of Coca-Cola syrup. Since syrup has a limited shelf life of about 30 days, it is my practice to order syrup several times a month. TAFT usually maintains an inventory of no more than one week's supply of syrup. Until the incidents of August 10, 1971 and August 12, 1971 described below on this Affidavit, COCA-COLA'S Los Angeles syrup plant had never refused to ship any order for syrup to TAFT.

5. In addition to syrup for its own bottling operation, TAFT has ordered large quantities of canned Coca-Cola products from CANNERS. However, CANNERS, acting under orders from COCA-COLA, has refused to fill most of TAFT'S orders for canned Coca-Cola products. I have been informed on several occasions by CANNERS that they only fill TAFT'S orders on a case-by-case basis with prior approval from COCA-COLA. TAFT has usually received one truck load (or 1980 cases) of canned Coca-Cola products per month. TAFT has sometimes received two such truck loads per month.

6. On August 3, 1971 TAFT ordered 1980 cases of canned Coca-Cola products from the San Leandro, California plant of CANNERS, which order consisted of 330 cases of Coca-Cola, 330 cases of Simba, 660 cases of Tab and 660 cases of

Fresca. On August 4, 1971 TAFT ordered an additional 5,940 cases of canned Coca-Cola from CANNERS. These orders were placed by me by telephone and confirmed in letters subsequently mailed to CANNERS, which is my usual procedure for ordering canned Coca-Cola products. On August 9, 1971 I telephoned CANNERS to confirm the dates of shipment of the above mentioned orders for canned Coca-Cola products. It is my usual practice to confirm such orders by telephone after several days so that I can make the necessary unloading and storage arrangements to handle the cases of canned products. In that telephone call, I was informed that the orders would have to be approved by Mr. Gibson, the Manager of the San Leandro plant of CANNERS, and that Mr. Gibson was not then available. On August 10, 1971 Mr. Gibson telephoned me. He told me that the entire problem of TAFT attempting to obtain adequate quantities of Coca-Cola syrup to meet the demands of its customers had been "dumped in the laps" of Mr. Gibson, Bob Daniels, the Manager of COCA-COLA's Los Angeles syrup plant and Mr. Don Wilson, who is an employee of COCA-COLA. I believe Mr. Wilson is in some manner the supervisor of both Mr. Gibson and Mr. Daniels. Mr. Gibson further informed me that Messrs. Gibson, Daniels and Wilson had decided to limit TAFT to a quantity of Coca-Cola syrup each month equal to 150% of the quantity of syrup which TAFT purchased during the corresponding calendar month of 1970. He stated that, under this formula, when a previously placed order for 1980 cases of canned Coca-Cola was filled, TAFT would have a remaining allotment of 12 gallons of syrup for the month of August, 1971. This is enough syrup to bottle approximately thirty cases of Coca-Cola. Mr. Gibson further told me that a previously placed order for 1980 cases of Coca-Cola would be delivered that day (which order was subsequently received by TAFT that day) but that the Coca-Cola portion of the 1980 case order which was placed on August 3 would not be delivered, that none of the 5940 cases of Coca-Cola ordered on August 4 would be delivered, that no additional canned Coca-Cola would be delivered in August and that COCA-COLA's Los Angeles syrup plant would only deliver an additional 12 gallons of Coca-Cola syrup in August. Mr. Gibson told me that he would consider further whether or not he would ship the other Coca-Cola products, such as Tab, Fresca, Simba or the like.

7. Later in the day of August 10, 1971 I telephoned Mr. Gibson to inquire about the possible shipment of the other Coca-Cola products. He told me that since our earlier conversation described above, he had decided that the 150% limitations was to be applied to the total quantity of syrup of all kinds to be sold to TAFT, and that accordingly no additional canned products of any kind would be delivered in August. He stated that he had notified COCA-COLA in Atlanta, Georgia of his decision.

8. On August 12, 1971, I attempted to order by telephone an additional five barrels of Coca-Cola syrup and one barrel of [unclear] syrup from COCA-COLA's Los Angeles syrup plant. They refused to accept my order. The persons to whom I talked refused to tell me their names.

9. Since the commencement of this action, TAFT has continued to supply Coca-Cola products to its long established customers in its territory as defined in the Bottler's Contract which is Exhibit 1 to the complaint in this action. TAFT has also supplied quantities of Coca-Cola products in its territory to certain customers who had not purchased from TAFT prior to 1971, such as TOMAC, SAFEWAY and THRIFTIMART. I have been advised by legal counsel that TAFT cannot legally restrict what any of its customers do with any product once they purchase it from TAFT, so I have made no attempt to control what these new customers have done with any products purchased from TAFT. I have been further advised by legal counsel that any provisions in TAFT's Bottler's Contract which restrict the territory in which TAFT can sell Coca-Cola products are invalid, but because of the limited quantity of Coca-Cola products which COCA-COLA and CANNERS have supplied TAFT, TAFT has not sold any Coca-Cola products outside of its territory.

10. TAFT presently has only approximately 100 gallons of Coca-Cola syrup on hand. If TAFT does not obtain additional syrup, it will run out of syrup by August 18, 1971. After that day, TAFT will no longer be able to bottle products to sell to any of its customers. It is my practice to deliver Coca-Cola products to my retail customers in and around TAFT at least twice a week. They expect this service and it is necessary in order to retain their good will. If TAFT has no Coca-Cola products to deliver after August 18, 1971, it will lose their valuable goodwill which it has acquired during 36 years of doing business. If TAFT is unable to supply their needs for Coca-Cola products, they will be forced to

satisfy their needs elsewhere, either by obtaining Coca-Cola products from wholesale grocers, if they have access to such wholesale grocers or by switching their business to other products such as Pepsi-Cola. In either event, it will be very difficult for TAFT to regain their patronage.

11. In my Affidavit of February 8, 1971, already on file in this action, I described how I have been informed by COCA-COLA that TAFT'S bottling facilities must be replaced. Our present facility is over 35 years old. In addition to being an uneconomic facility relative to newer facilities, the building does not comply with the present State Health Code. TAFT has been inspected several times in recent months by the representatives of the State Health Department. They have informed me, as has inspectors from COCA-COLA, that our facilities do not comply with the State Code and that they see no way the present facilities can be modified to comply. They have told me that a new plant must be built. I have told them that I wish to build a new plant, but I am unable to do so at the present time because I am unable to obtain adequate quantities of syrup to bottle in the new plant. They have informed me that if we do not take prompt steps to begin building a new facility, they will have no choice but to order that our present facility be closed.

12. It is now possible for TAFT to build a new, modern facility which fully complies with the Health Code if we can obtain assurances of an adequate supply of syrup. TAFT now has purchase orders from responsible customers for more than 3,000,000 cases of Coca-Cola products per year. THRIFTIMART has also purchased from me 51% of the outstanding shares of TAFT. THRIFTIMART is willing to finance the construction of a facility of sufficient size to fill these orders if we can be assured an adequate supply of syrup. See the accompanying Affidavit of Robert E. Laverty, President and Chairman of the Board of THRIFTIMART.

13. In my Affidavit of February 3, 1971, already on file in this action, I stated that COCA-COLA had announced a policy of reducing the number of bottlers. There are presently about 840 bottlers of Coca-Cola. On July 29, 1971, in a meeting which I attended in Atlanta, Georgia with J. Lucian Smith, President of the COCA-COLA USA division of COCA-COLA, Mr. Smith stated that COCA-COLA intended to reduce the number of bottlers to 78. TAFT wishes to be one of those 78 surviving bottlers. At the present time TAFT is one of the smallest Coca-Cola bottlers in the country. I believe we are the smallest bottler in California. During 1970 we purchased from COCA-COLA 6696 gallons of syrup, which is enough syrup to bottle approximately 20,000 cases of 12-ounce containers of Coca-Cola. It is obvious that if TAFT obtains enough syrup to fill the above mentioned orders for over 3,000,000 cases per year from our new customers, it will survive as a healthy competitor in the Coca-Cola business. It is equally obvious that if COCA-COLA continues to limit TAFT'S syrup supply to 150% of its 1970 purchases, our new customers will leave us, and TAFT'S chances for survival in the forthcoming reduction of bottlers is practically non-existent.

14. Unless this Court grants relief, TAFT will be unable to supply the requirements of any of its customers, wherever located and whatever size, and will lose the goodwill of all of its customers. Without the continuing business of its long established customers, its new customesr and other business which it can obtain with an adequate supply of Coca-Cola syrup and Coca-Cola in cans, TAFT will be unable to continue in business. As a result TAFT will be forced out of business before its rights can be determined in this litigation.

Dated: August 16th, 1971 at Newhall, California.

WILLIAM P. FOSTER

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Subscribed and sworn to me on this 16th day of August, 1971.

MARJORIE E. STEWART,
Notary Public in and for said County and State.

TAFT, CALIF., *September 12, 1972.*

Senator PHILIP HART,
Senate Office Building,
Capitol Hill, D.C.:

Soft drink bottlers should not be exempt from complying with antitrust laws. Fair competition and free enterprise are essential for a healthy Nation. The Coca-

Cola Co. is attempting to monopolize production and distribution of its products at the expense of its own small franchise owners. A monopoly of this kind can only hurt the consumer. If you exempt one industry from these controls you must exempt all industries. Please work against the bottlers bill that is now in committee. To oppose this legislation support your own Federal Trade Commission.

Dr. F. GORDON CAIRNS,
Superintendent, Taft, Calif., School District.

TAFT, CALIF., *September 13, 1972.*

Senator PHILIP HART,
Senate Building,
Capitol Hill, D.C.:

Taft, California citizens have launched a campaign supporting local Coca-Cola bottler Pope Foster telegrams and letters are now going to our legislators and members of your committee requesting efforts to defeat bottlers bill in Senate committee. Approval of bill would increase population and compound problems of overcrowded cities. Taft can accommodate wants and needs this and other industry for survival and we believe that exposure through national TV and news media would help entire cause. Can you please tell us proper contacts to bring the matter to their attention. We hope for acceptance as human and public interest item.

DOROTHY F. HARRINGTON,
Postmaster and Committee Chairman.

SALT LAKE CITY, UTAH, *September 22, 1972.*

PHILIP HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation,
Washington, D.C.:

The 39 soft drink manufacturers who comprise the Utah-Idaho Soft Drink Assn. unanimously support Senate bill number S3133 the industry franchising bill. We feel that the passage of this bill is absolutely necessary in order for us small bottlers to survive. Please make this expression of our support of this legislation part of your official hearing record.

DONALD V. CURRAN,
President, Utah-Idaho Soft Drink Assn.

DENVER, COLO., *September 22, 1972.*

PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation,
Washington, D.C.:

Colorado Soft Drink Association supports and strongly endorses bill S3133 and requests that our endorsement be made a part of the official hearing record.

A. DALE SHEARER,
Executive Secretary, Colorado Soft Drink Association.

JACKSONVILLE, FLA., *September 19, 1972.*

Senator PHILIP A. HART,
Chairman, Subcommittee Antitrust and Monopoly Legislation,
Capitol Hill, D.C.:

The entire membership of Florida Soft Drink Assn. although in vigorous competition with each others brands of soft drink unite to endorse and support the industry franchising bill S. 3133. Many of our members have already made known to our Senators and Congressmen their anxieties about what the proposed FTC ruling will do our industry particularly the small bottler. Also request that this message be made a part of the official hearing record.

HOOD DITTMAR,
Executive Secretary, Florida Soft Drink Assn.

TAFT, CALIF., *September 20, 1972.*

PHILIP HART,
Senate Office Building, Capitol Hill, D.C.:

We understand that the bottlers bill is currently before your committee. In the interest of the basic principle of our economic system free enterprise we earnestly request your support in defeating this piece of legislation. Allowing parent companies to dictate the volume of business a franchised bottler can engage in should be definitely considered a monopoly and tantamount to price fixing. Many cities faced with ever increasing problem of industrial survival will be adversely affected if this legislation is allowed to pass. We are therefore hopeful that you will support our request and seek a recommendation of do not pass on this particular bill.

ROBERT L. KIBBEY,
City Manager, Taft, Calif.

BATON ROUGE, LA., *September 22, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Capitol Hill, D.C.:

As secretary of the Louisiana bottlers association I have been authorized by the membership to advise you that this association endorses and supports industry franchising deal S. 3133. I should like to request that this statement of support be made a part of the official hearing record. Original telegram Senator Philip A. Hart, copy to Tom Aker.

GEORGE CONNOR,
Secretary Treasurer, Louisiana Bottlers Assn.

U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
Washington, D.C., August 9, 1972.

Hon. PHILIP A. HART,
Chairman, Subcommittee on Antitrust and Monopoly Legislation, Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR HART: Enclosed is a copy of my statement on the territorial franchising bills on which you are holding hearings at the present time.

I would greatly appreciate it if you would have my statement included in the record.

With warm personal regards,
Sincerely,

MILTON R. YOUNG.

STATEMENT OF SENATOR MILTON R. YOUNG (R–N. DAK.)

Mr. Chairman, I am most pleased that you have called hearings on the several territorial franchising bills pending before your Subcommittee. As you know, I am a co-sponsor of one of these bills, S. 3133.

This legislation was made necessary by action taken recently by the Federal Trade Commission challenging the current franchise system used by soft drink companies which is based on certain territorial rights and responsibilities.

The Federal Trade Commission has charged that territorial marketing restrictions are in restraint of trade. Mr. Chairman, if the Federal Trade Commission should prevail in its action, which is highly unlikely in light of court decisions in this area, this would have a very adverse effect on the soft drink bottling industry, not only in my state, but throughout the country. The mere fact that he Federal Trade Commission complaint is pending has already had a very serious impact on these bottlers.

In North Dakota, and I am sure the same is true throughout the nation, the majority of the soft drink bottlers are what can be rightly called small businesses. Their owners are highly respected members of their communities and, in many cases, they are among the larger employers in a community. All of these bottlers fear that if the Federal Trade Commission is successful in its action it will have the effect of driving them out of business. They all operate on a very small margin of profit. They fear that without territorial protection and with the trend to house labels their prices, temporarily a least, will be undercut, thereby driving them out of business.

I emphasize, Mr. Chairman, that their prices will be temporarily undercut. I am confident that once these companies have achieved their objective of driving these small bottlers out of business prices immediately would go up.

According to information I have received from soft drink bottlers in North Dakota, there is already an indication that attempts are being made to consolidate these bottling companies in larger metropolitan areas outside of my state. Several bottling companies already have been purchased by interests outside of North Dakota.

Mr. Chairman, the argument that territorial sales restrictions are in restraint of trade and adversely affect the consuming public, in my opinion, just cannot stand close scrutiny. One has only to visit any supermarket, drug store, or other retail outlet to see the plethora of competitive soft drinks available. Under the current system the consuming public has a very wide range of selection of soft drinks.

Not only does the public have a very wide selection of soft drinks, but these are available at reasonable prices. In this day of constantly rising wholesale and retail prices, the price of soft drinks has risen very little.

I doubt that adverse action by the Federal Trade Commission would have any effect on the franchisers as they would be able to sell their basic product to the consolidated soft drink bottlers and to those large bottlers who bottle on a contract basis for our huge chain store outlets. The only effect would be to drive out of business independent businesses located in smaller communities throughout the United States and to consolidate this type of industry and employment in large metropolitan areas.

As I stated previously, indications are that this consolidation has already begun. This makes it imperative that legislation such as Senate Bill 3133 be enacted at an early date. There is every justification for this legislation, and I sincerely hope your Subcommittee will see fit to approve it.

SUBMITTED AS TESTIMONY IN BEHALF OF PASSAGE OF S. 3133, BEFORE U.S. SENATE ANTITRUST SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE BY ED WIMMER, PRESIDENT, FORWARD AMERICA, INC., COVINGTON, KY.

(Highlights of Radio Commentary, Ed Wimmer, Commentator)

Title—Which Is It to Be—"Intrabrand" or "Interbrand"?
FTC Challenged; New Ruling Not In "Public Interest"
U.S. Senate Moves to Nullify Blow Against Territory and Trademark Franchise

This week, ladies and gentlemen, we are going to talk about a decision of the Federal Trade Commission, and I want to entitle it: "Consumerism and Who Knows the Difference Between Intrabrand and Interbrand."

Do you? I have been unable to find anyone who does know, so let us try to find out what Interbrand and Intrabrand is all about.

We can start with the soft drink industry because interbrand agreements or franchises, represent the remains of distribution used by such companies as Coca-Cola, Pepsi-Cola, 7-Up, Dr Pepper, and other brand name syrup makers which confines bottlers or distributors, often both, to restricted territories, who operate under pricing arrangements that call for the continuation of profit-taking, progressive, private enterprise in this country.

If you were a bottler or distributor in Dayton, Ohio, for example, and you serviced the Kroger, Woolworth, Sears, K Mart, and other kinds of outlets handling soft drinks in specified areas in your contract or franchise, the bottler or distributor in Cincinnati was restricted from selling in your territory, and the chains HAD to abide by the said franchise and receive their supplies the same as any other outlet.

This applied to bottlers and distributors in every area of the national economy, and it was a good system that provided many opportunities for people with limited means to be in business for themselves.

CONSUMERS AND INTERBRAND

As I said in the beginning, this was called interbrand arrangement (or franchise), as I view it, which I repeat, the FTC has said is not in the best interests of the consumer; causing me to ask at this point: what are the bottlers, their employees and the people who sell them trucks, insurance, equipment,

office supplies, gasoline, who bank their receipts and collect their taxes—if not CONSUMERS? Certainly, the system has worked to their best interests.

Intrabrand competition, on the other hand, FTC says, works better because intrabrand competition breaks down territorial protection arrangements, thus allowing Kroger (as an illustration) to buy all its soft drinks from a big Columbus, Cleveland, or Cincinnati bottler, have it delivered, or have it loaded into Kroger's fleet of trucks that service all of Kroger's Ohio stores.

SENATOR COOK

Under the intrabrand system, all the big chains could confine their buying to the biggest soft drink handlers, say, from three or four points in the state, and thus squeeze bigger concessions from the big bottlers, cutting out all the smaller bottlers and local distributors whose existence depends on the huge volume sales of the big chains.

United States Senator Marlow Cook (Ky.) listed 67 small bottlers in his state, and said if the Congress fails to nullify the FTC order, the giants will become more giant, and Kentucky will end up with maybe ten or fewer bottlers. The hard hitting, popular Senator from the Blue Grass, declared in a statement on the floor of the Senate: "Far from encouraging competition, the FTC action will result in a monopoly for the few, including the grocery store chains. . . . Bottling plants in Kentucky employ 3,000 people with a payroll in excess of $25 million, with gross sales of over $60 million a year."

Senator Cook is a sponsor of Senate Bill 3133 introduced by Senator James Eastland of Mississippi, which preserves the present franchise system, but we will come back to this later.

OREGON OFFICIAL SEES DISASTER

Harold Carlson, Executive Secretary, Oregon Independent Retail Grocers' Association, writes our office in Covington, Kentucky, that the intrabrand decision could force Coca-Cola, 7-Up, Pepsi-Cola, Royal Crown, Dr. Pepper, Squirt, Mission, and similar companies to "close out their independent distributors and operate their own system as the only means of controlling the movement and sale of their product," which, he says (in agreement with our own view), "will become as harmful to the manufacturer and the public as it will be to the independent bottlers."

What Mr. Carlson and Senator Cook are talking about, of course, is the known fact that continued concentration of business in fewer and fewer hands ends up harming everyone in one way or another, a condition we have seen happening in one area of the economy after another.

FTC AND ANTITRUST

FTC was created by Congress in 1914, under explicit instructions to go out into the market place and prevent monopolistic practices and reduce monopoly power in the public interest, and in many respects FTC has performed a herculean service with the limited money and personnel it commands. Like the Department of Justice, however, it has had few administrators and economists who understood that no trade is good trade that isn't free and fair trade; any more than a football game is sport without a referee to call the rules and enforce them. No fair play, no football. So far as the marketplace is concerned, this concept was lost over 50 years ago, and we know the game has been over for a long time in one line of business after another.

ECONOMIC MURDER, INC.

There are people actually in charge of antitrust and enforcement of fair, competitive practices, in fact, who believe it is in the interest of the consumer if two or three giants are slugging it out with cut-price milk, coffee, eggs, chickens, beer, bread or pot roast; laying the dairyman, baker, poultry dealer, and independent coffee roaster to rest in the process—along with a string of independent grocers.

Except in some rare cases where soft drink syrup manufacturers franchised several plants to a single operator, the bottler or distributor, or both, franchising has been good for the smaller entrepreneur. The independent car dealer is certainly a better representative of the decision making, local employer, local citizen concept than a factory owned dealership, and the same can be said of service stations, tire stores, or any kind of retail or distributor business.

MOTOROLA GOOD EXAMPLE

A few years ago I had long visits with a vice president of Motorola. He had worked up advertisements that read: Without the Independent Retailer There Will Be No Motorola. He said if we cannot find ways of controlling the distribution and good name of Motorola, and offer our dealers a franchise that is profitable enough to enable them to service our products, our next step will have to be company owned outlets.

Sylvania said the same thing. So have others. I know a brewery family who believes in preserving and perpetuating an independent system of servicing their territories, but officials say that if the Congress fails to nullify the FTC decision, they are ready to buy all their independent beer distributors. What I am talking about my friends, is a trend in this country that is about as far away from consumer interest, or anything resembling democracy, as you can get, and it is showing up in the frustration of our kids, and the growing need for more and more public assistance.

SENATE BILL 3133

With regard to the intrabrand notion of FTC, I want to go back to the Eastland proposal, Senate Bill 3133, which has been scheduled for hearings before the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee early in August, but due to Senate debate over the war amendment, no-fault insurance, the budget, and welfare programs, there may be a number of delays in getting full Senate action.

BARGAINS NOT BARGAINS

The thing that bothers me so much is the growing number of educators and big name economists (and the general public) who cannot see that a bargain is a bargain only when both buyer and seller have profited. The seller on his time and investment, and the buyer by getting quality products and guaranteed servicing if something goes wrong.

A price cutter says: "There it is. The price is cheap. Carry it out to your car. We don't deliver, and we don't service." The lawn mower, washing machine, or toaster breaks down, and the dear consumer howls to high heaven. The more he buys from the price cutter who used a brand name to draw him away from a legitimate dealer, the more the manufacturer has to cut down on quality and service, until today we are the worst serviced people in the world.

What does this have to do with intrabrand and interbrand selling of soft drinks? With Senator Eastland's Bill now sponsored by 35 Senators, and good and needed as it is, waiting on time that could see hundreds or thousands of independents being bought up?

YOUR PROBLEM

My friends, it is all one big problem. Your problem. My problem. Because in this country we more or less rest our fate on the destiny of goods and services, and if the destiny of goods and services is the graveyard of free enterprise, you won't have a shadow of a Republic to celebrate on July 4, 1976; a day that COULD go down in history as the greatest event in 2,000 years.

Independence with Independents, and The More The Independents The Freer The Nation, are not slogans. They are a Way of Life, and fighting for these bottlers, beer distributors, soft drink makers, et cetera, must go on whether they deserve anyone fighting for them or not because every independent still in business is proof that free enterprise still lives, and the Hearings on Senate Bill 3133 is proof that representative government still lives.

I hope you will write for a copy of this broadcast, and I hope, too, that you will be able to tell your friends that intrabrand distribution is not needed in any part of the economy where any product is in free and open competition, and that interbrand arrangements offer more people in more places an opportunity to participate as independent individuals, in the distribution of American goods and services.

Today, 100 manufacturing corporations control more than 50% of all manufactured products. Do we want to increase that concentration? The wolf may object to being kept from the sheep by the shepherd, on the grounds his freedom has been restricted, but what about the flock?

In a letter to this commentator, U.S. Senator Hiram Fong (Hawaii) put S. 3133 in focus when he said this Bill provides:

"Under the Federal Trade Commission Act, S. 3133 provides that exclusive territorial arrangements in any trademark licensing contract or agreement for the manufacture, distribution and sale of a trademark food product shall not be deemed unlawful, provided such product is in free and open competition with products in the same general class, manufactured, distributed and sold by others; (2) that the licensee is in free and open competition with vendors of other products of the same general class; and (3) the licensor retains control over the nature and quality of such product in accordance with the provisions of the Trademark Act. . . ."

This Bill, my friends, is no more than a quarantee that a man who invests his money, time and energy in a limited territory agreement shall be protected against invasion of that territory by forces against which the small and medium size independent enterpriser is helpless.

All through the animal kingdom, from the bear cub to the beaver and even some species of deer, each stakes out his little territory where the family is born and reared, and even the deer fights to protect it. Man has always sought a bit of ground that he could say was his, and he, too, fought to hold that ground.

Under the free enterprise system as visioned by the Founding Fathers, the right to own a farm or start a small business was considered basic to all other freedoms; and always under a system that even resembled economic democracy, the more of these independent territorial prerogatives the greater the economic democracy and political liberties that are inseparable from such economics.

Franchisers in almost all cases, concentrate their appeals to investors on the inner-hopes of the prospect to begin something of their own even though it is only partially theirs, and if all franchising had been so pursued, it could have been one of the greatest boons to strengthening free enterprise in this country, especially the single unit franchise, if it were franchisee-controlled after 3– to 7–years operation.

When the Federal Trade Commission and the Department of Justice move against the manufacturer, the franchiser, and the franchisee arrangements that are based on establishing the greatest possible number of independent outlets, whether distributors or retailers, it seems to this commentator that the two agencies most identified with protecting the independent enterpriser are, in fact, putting him out of business.

Over the last several years there seems to be a feeling developing in many areas of our society that profit-taking, and especially profit-protection, is a sin against the consumer; that consumers are helped when the big profit-takers are murdering each other and their smaller competitors, as now witnessed in the supermarket industry.

Justice Brandeis said that predatory competition removes the resourceful small businessman from the business community. He said it is a moral as well as an economic and political problem.

In some areas of the economy, franchising has been run-through with diabolical practices, and under the system some men have built enormously powerful chains and combines. This fact, however, should blind no one to its potential for good.

Reporting on the over-all situation two years ago, the Senate Small Business Committee urged that every effort should be made to keep the center of gravity of our national economy anchored among the millions of small businesses.

On these words I rest my case.

Until next week, ladies and gentlemen, thank you for listening.

* * * * * * *

JULY 3, 1972.

STATEMENT OF T. BERNARD DUNLOP

My name is T. Bernard Dunlap, Co-owner and General Manager, Pepsi-Cola Bottling Company of Kenosha and Racine, Wisconsin, a position I have held since mid 1953. Our franchise includes Kenosha, Racine and the East half of Wolworth counties in the Southeast corner of Wisconsin. The population of this franchise is approximately 310,000.

As background information it is important to offer a brief history of the circumstances which led to my involvement in this business.

In 1953, a proposition was made to me by the two gentlemen who owned this franchise to become a partner and general manager. This necessitated making a $10,000 down payment, signing notes for an additional $15,000 and getting on with the task of gaining sales and earning profits against a major competitor who reportedly outsold us six to one in case sales. At that time, profits were

meager or non-existant and a great risk lay ahead. I had a free choice to study all aspects of the enterprise, and accept or reject it as my judgment might dictate.

Pepsi-Cola in 1953 was a product on the grow. Its national leadership was relatively new and ambitious. It was apparent that much hard work and capital investment in the development of each franchise market was crucial. The exclusive geographic provision in the franchise agreement was the prime consideration in becoming involved. It was only by knowing our defined area that we could estimate the total market volume of sales and our relative position to that volume and intelligently invest our resources.

As sales grew, literally every dollar above bare operating expense was used to promote the market in advertising and promotion, hiring and training new personnel, buying needed capital items, for example, vehicles, bottling machinery, vending equipment, display items, etc. Against strong competition we did grow in volume, profits and in expenses. Meanwhile, we became a viable part of the community.

The one thing we did not fear was the validity of our franchise agreement with the Pepsi-Cola Company. Although, the Pepsi Bottlers immediately to the north, Milwaukee, and the south, Chicago, were much larger by comparison they had their areas of responsibility against which to invest. They competed against the other softdrink companies in their respective areas. They were subject to labor demands, tax assessments and other costs within their sphere of operation.

Our objective was to keep our prices as low as was consistent with reasonable profits and to manage our available resources as prudently as our abilities permitted. This method has been consistently followed year after year. Each successive year we have employed more people, purchased additional equipment, paid higher taxes and faced more and more problems.

Without a doubt the greatest problem we have ever faced is the pending Federal Trade Commission action against the softdrink companies. If the F.T.C. charges were to prevail we would unquestionably find our equity markedly reduced over night.

Ironically, the chain stores who are our largest single account are likewise our largest single competitor with their private label and/or store brands. To eliminate the franchise boundary and allow warehouse delivery would appear on the surface to benefit the consumer. The fact is that chains for logistical reasons would necessarily convert to convenience packages which costs the consumer appreciably more per ounce than products they now buy in returnable containers under the present system. Additionally, the increased ecological problem would be astronomical.

The chaos and uncertainties that such action would impose on our franchise is immeasureable. For example, if we lose the chain store business which is virtually a certainty because of sheer economic considerations, we would have no choice but to eilminate jobs, raise the price of our products to our remaining customers. "Mom and Pop" stores and all other types of businesses would suffer along with us as would the consumer.

The elimination of franchise boundaries would unquestionably result in the restructuring of the softdrink industry as we know it and would not result in a savings to the ultimate consumer. In fact, just the opposite would be the case.

Without being in any sense facetious, one might apply the same restructuring logic to other businesses. One large drug store in a town of 50,000 people might conceivably sell each item at a lower price. One bank per county could presumably maintain a somewhat lower interest rate than is now being charged under the present system. There is no limit to the comparisons one could make.

This whole matter is of such vital concern to me as a small bottler that I have spent much time in pondering the subject. If F.T.C. were to prevail the damage to this small bottler, between two giants, on the shores of Lake Michigan, would be disastrous. For nearly a century the softdrink industry has survived because of the entrepreneural nature of its participants and because we have had a legal, ethical and morally valid contract against which we could invest, grow and be a meaningful and viable part of the communities across America.

If we have been wrong all these difficult years, God help America for we are all in serious trouble.

PEPSI-COLA BOTTLING CO.,
Corvallis, Oreg.

STATEMENT OF MARIO PASTEGA

In the July 4th issue of our local newspaper, the headlines read "U.S. Ships Shell North Vietnam by Computer." Captain Edward J. Brown, the commanding officer, called it a classic use of naval gunfire because there is little need for improvisation and virtually no contact with the enemy and the harassment factor is extremely important.

In this city of Washington, D.C. the soft drink bottlers of the country have been bombarded by the computer of the F.T.C. with virtually no contact with the enemy and the harassment impact is extremely high. At least no contact between the F.T.C. computer and the grass roots element of the soft drink industry.

This morning, with permission and indulgence, I am going to talk about a very popular subject: The little people of America; I am going to also talk about another very popular item which is affecting every human being, and that is ecology. I will also cover a subject that is not at all popular, but very prevalent in our country today and that is cancer. I will finish with a story about the Studebaker automobile.

My name is Mario Pastega. I am of Italian descent. I don't have any God-Father characteristics that deal with violence, because if I did have any such characteristics we could probably make the F.T.C. an offer they couldn't afford to turn down.

My father and mother came to this country some 65 years ago with identification tags on their lapels so that, like a package, they would reach their destination. My father's only assets were his two strong arms and the desire to work. My mother never had any formal education because being from a large family she begged for food to help the family survive. So from my father I learned how to work and from my mother I learned how to give.

I am a small bottler from a small State. The name of my town is Corvallis, Oregon. We are franchised for two counties with a total population of 105,000 people. Because of the small population we have several franchises in order to exist. There are many, many soft drink plants in the United States that are in this small-bottler classification. In fact the majority of the plants are small entities. Some cover many counties, mainly because of the lack of people.

As a small bottler we wear many hats. When a cocktail lounge calls you at midnight and tells you that they have two hours to go before closing and their place is filled with customers and their soft drink dispensing unit isn't functioning you don't call up the computer or refer it to an answering service—you get out of bed and take care of the problem. We wear the hat of personnel manager because we can't afford one. When production isn't up to par or equipment breaks down, you become a mechanic. When you have to borrow money at the bank for equipment or for construction you become the financial end of the business. If one of our sales employees is disabled, we know how to climb into his route truck and run his route, because that's where most of us received our baptism into this business.

On October 1, 1972 in the State of Oregon, one of the landmarks of ecology will be put into effect because on that day there will be a mandatory deposit on all soft drink and beer containers whether they are reusable or not. Our Governor and Legislature have declared that the flip-top, throw-away society of the 60's must yield to the reusable cycle of the 70's. The small bottler fits into the ecology picture because most small plants are equipped to satisfactorily handle the returnable packages, because in 99% of the plants, the returnable bottle was the basis of their production. The consuming public will be served ecologically and economically because the containers will be recycled.

When the Commanding Officer at the FTC ordered his computer to fire its salvo on the franchise system, what he was really doing was exploding the seeds of cancer—in this instance, the cancer of bigness, and uncontrolled growth gone mad is the deathly result of cancer. What the Commanding Officer at FTC was hearing from the little imp in his computer was—if you destroy the franchise system, you will save the consuming public 500 million dollars a year and a big hero you'll be.

If you are trying a case in court, and you don't have the facts then you first try to befuddle the jury and if that fails you then try the judge. We have the facts and here is how a small bottler views them. If the FTC were to prevail and the franchise system destroyed, in my case, and in that of several thousand bottlers throughout the country just like me, and this would apply in every State which each one of you represent—our neighboring bottlers who are much

larger than ourselves would come into our market and take the cream and this would be done initially by lowering prices or literally buying our franchised area for a promotional price. They would keep this up until we were strangled with the small accounts that they could care less about, namely, the small independent grocers; the "mom and pop" stores; the service station; the restaurant; the motel and others of similarly small stature. They would eventually force us out of the volume markets because of their pricing tactics. After we were dissolved or forced out at "*flea-market*" prices he, the predatory big-bottler, would then look at his Bible, the verse and chapter listed under R.O.I. in the lay vernacular referred to as Return on Investment. His Bible would then tell him that where the R.O.I. is weak and unsatisfactory and the volume was saturated that the only prayer of survival he would have would be to raise his prices and so the temporary relief from the pain of higher pricing that the consuming public had would become another symptom of the cancer of bigness . . . and still the small independents and others I above referred to would have to make other arrangements to get product, but all of our services to them would be eliminated; services like on-premise delivery; maintenance in good repair of equipment; promotional activities; customized advertising and also the friendly relationship of customer and client.

Our customer is now receiving all of the above services, and the consuming public in the Northwest, now and for the past two years has been afforded the opportunity to purchase the most nationally known cola and their related products at a per-ounce pricing equivalent to and on many instances, better than pre-World War Two pricing. How many other industries can make a similar statement?

We have all seen the cancer of bigness in the automotive industry. Why have over 400,000 Torino models of Ford been recalled and why are all of the Vegas produced by Chevrolet up to May, 1972 being recalled because of severe defects that could cause bodily harm. I know that the computer didn't catch this part yet, but maybe some of you remember the Studebaker automobile advertisements that boasted of the pride of workmanship, (a facet of the above industry that is rapidly disappearing), that was passed on from father to son and both were working for Studebaker and were proud of their years of accomplishment together. In my case I am now at the same cross-roads as Studebaker because it was devoured by the giants and we are in that same process. I am proud to say that I have my three sons working with me in our business. We all have that pride of producing and selling a good product to the consuming public at a reasonable price. This industry of ours has operated with the franchise system for over 70 years and surely you can't say that the consuming public has been overcharged when, in many instances they are able to purchase at prices I referred to. There have been many father to son and to grandson entities.

Our country was made great by its little people and I hope that we won't let a heartless electronic gadget destroy one of the basic roots of our society—the small businessman.

I appreciate your indulgence and it is very difficult to interpret 24 years of work into ten minutes in an effort to save all that you have built as it would be for you, in case a proposal, God forbid, were made to abolish the Senate, to present in only ten minutes, your side of the case. Thank you.

MARIO PASTEGA.

U.S. SENATE,
Washington, D.C., September 15, 1972.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D.C.

DEAR SENATOR EASTLAND: Enclosed is a copy of a telegram I received from Mr. Harry M. England of Reserve, La., concerning S. 3133.

It is my understanding that this measure is presently pending before the Subcommittee on Antitrust and Monopoly. I would sincerely appreciate your calling Mr. England's views to the attention of the committee so that they can be given every consideration.

My very best wishes,

Sincerely yours,

ELAINE S. EDWARDS,
U.S. Senator.

RESERVE, LA., *September 14, 1972.*

Hon. ELAINE EDWARDS,
U.S. Senate,
Washington, D.C.

Earnestly request that you support the soft drink industry bill that is now being considered by the Senate Subcommittee on Antitrust and Monopoly. Please contact Senator Phillip Hart and Senator James Eastland in a positive effort to win their support for the position of the soft drink industry.

Thanks for your help.

HARRY M. ENGLAND,
President, Coastal Canning Enterprises, Inc.

U.S. SENATE.
Washington, D.C., September 18, 1972.

Hon. PHILIP A. HART,
Chairman, Subcommittee on Antitrust and Monopoly Legislation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In connection with the Subcommittee's hearings on legislation relating to the soft drink bottling industry, I am passing on to you for your information and consideration copies of two telegrams I have received urging that this legislation be taken up before September 30.

Sincerely yours,

CLINTON P. ANDERSON.

CLOVIS, N. MEX., *September 14, 1972.*

Sen. CLINTON P. ANDERSON,
Senate Office Building,
Washington, D.C.

DEAR SENATOR: Your help is needed again by the soft drink bottling industry of the State of New Mexico. Final hearing by the Senate Subcommittee on Antitrust and Monopoly on proposed legislation pertaining to soft drink industry territorial provisions will conclude September 14. It is very important that the hearing testimony be produced and the bill voted upon by the committee before September 30, I would certainly appreciate our contacting Senator Phillip Hart, Subcommittee Chairman and Senator James Eastland, Committee Chairman, requesting that they bring the bill to a committee vote September 30. We have been lead to believe that Senator Hart and Senator Eastland will respond to such a request. This legislation is vital to the preservation of the soft drink industry and the survival of my company.

Sincerely,

DON BONNER,
Pepsi-Cola and Seven-Up Bottling Co.

ALBUQUERQUE, N. MEX., *September 14, 1972.*

Sen. CLINTON P. ANDERSON,
U.S. Senate,
Washington, D.C.

HONORABLE SENATOR: Re Senate subcommittee on Antitrust and Monopoly hearing concluding September 14, 1972. It is important to all New Mexico soft drink manufacturers and their employees that hearing testimony be produced by the subcommittee and voted upon by the committee before September 30, 1972.

Please assist New Mexico soft drink business by urging Senator Philip Hart, Subcommittee Chairman and Senator James Eastland, Committee Chairman, that the hearing tesitmony must be produced and the bill voted upon by the Committee before September 30, 1972.

Thank you,

RON GARDENSWARTZ,
President, Pepsi-Cola Bottling Co. of Albuquerque.

ATLANTA, GA., *September 28, 1972.*

Sen. PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation,
Washington, D.C.

The Georgia Soft Drink Asso., speaking for every Georgia soft drink bottler would like to take this opportunity to urge passage of our industries franchising bill (S. 3133). We fully endorse and support this legislation and urge its passage at the earliest possible time. We also respectfully request that the contents of this telegram be made a part of the official hearing record.

Thank you,

BRYCE HOLCOMB,
Executive Vice President, Georgia Soft Drink Association.

PEPSI-COLA BOTTLING CO.,
Idaho Falls, Idaho, September 13, 1972.

Sen. FRANK CHURCH,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: Final hearings on S. 3133, Senator Eastland's bill to confirm legality of our 75-year-old franchise rights in the soft drink industry, are scheduled for completion on September 14. These hearings are being held in Senator Hart's Anti-Trust Subcommittee of the Senate Judiciary Committee.

The soft drink industry in Idaho consisting of 15 small plants is asking its two senators to contact Chairman Hart and prevail upon him to have the hearing testimony produced in time for a vote by the Committee before the Senate adjourns.

This bill is vital to preserve soft drink manufacturing in Idaho, our tax bases and our 375 jobs.

Yours truly,

HARRY M. BARSALOU,
Executive Vice President.

COEUR D'ALENE, IDAHO, *September 14, 1972.*

Re the soft drink industry bill before the Senate Subcommittee on Antitrust and Monopoly.

Sen. FRANK CHURCH,
Washington, D.C.

Will you please contact Senator Philip Hart, Subcommittee Chairman, and Senator James Eastland, Committee Chairman and ask that the hearing testimony on above be produced and the bill be voted on by the committee before September 30, 1972.

Thank you very much.

PEPSI-COLA BOTTLING CO.
CLYDE M. MANN.

SEPTEMBER 18, 1972.

TOM BAKER,
National Soft Drink Association,
Washington, D.C.:

This is to advise your committee that the soft drink industry unanimously supports Senate bill 3133. I know of no bottler in the State who does not encourage you to report this bill favorably out of your committee. We request that this unanimous support by the Oklahoma bottlers of carbonated beverages be made a part of the official hearing records.

CLYDE INGLE,
President, Oklahoma Bottlers of Carbonated Beverages.

WILMINGTON, DEL., *September 18, 1972.*

THOMAS BAKER,
Washington, D.C.:

Delaware Bottlers unequivocally endorse and support bill S. 3133. Request that this be made part of official hearing records.

CHARLES D. BROLL,
Vice President, Pepsi-Cola Bottling Co. of Wilmington, Del., for Delaware Bottlers.

PASADENA, MD., *September 18, 1970.*

Senator PHILIP A. HART,
Washington, D.C.:

We support Senate bill 3133 and wish this telegram to become part of the hearing record.

E. T. GASSMANN,
Maryland Softdrink Association.

ROANOKE, VA., *September 16, 1972.*

Senator PHILIP A. HART,
Chairman,
Senate Subcommittee on Antitrust and Monopoly Legislation,
Washington, D.C.:

Please permit me to advise you and your subcommittee that our association supports and endorses the soft drink industry franchising bill S. 3133 and that we request that this endorsement be made a part of the official hearing record of your Senate subcommittee.

VIRGINIA SOFT DRINK ASSOCIATION, INC.,
JACK G. BESS, *Executive Secretary.*

COLORADO SPRINGS, COLO., *September 17, 1972.*

Senator PHILIP A. HART,
Senate Office Building,
Washington, D.C.:

It is most important to the bottling industry that Senate bill 3133 which is intended to preserve bottlers franchise lines be passed. If FTC gets their way almost 100 percent of the small and medium size bottling plants will be forced out of business. The new proposal of the FTC which I believe they call metro area bottler handicap is not the answer. What we need is a bottlers franchise bill passed so we can settle down to the business of manufacturing and selling soft drinks within the historic boundaries of our territories.

ROSS LANE,
PEPSI COLA BOTTLING CO.

MINNEAPOLIS, MINN., *September 16, 1972.*

Senator PHILIP A. HART,
Chairman,
Senate Subcommittee on Antitrust and Monopoly Legislation,
Washington, D.C.:

Minnesota Bottlers Association wholeheartedly supports industries franchising bill S. 3133 please make contents of this telegram part of official hearing record.

MINNESOTA BOTTLERS ASSOCIATION,
FRED W. LADE, *Executive Secretary.*

MIDDLETOWN, N.J., *September 16, 1972.*

Senator PHILIP A. HART,
Chairman, Subcommittee on Antitrust and Monopoly Legislation,
Washington, D.C.

As president of the New Jersey Soft Drink Association I wish to reaffirm this associations endorsement and support of S. 3133 and kindly request that this request be made a part of the official hearing record.

NATHANIEL KREHBIEL.

ABILENE, TEX., *September 17, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislative, Washington, D.C.

Texas Soft Drink Association at its annual convention January 26, 1971, voted unanimously to support the National Soft Drink Association's position in opposition to the Federal Trade Commission's complaint against soft drink sirup manufacturers' franchising system.

Texas bottlers in convention January 29, 1972, voted to support Federal legislation identical to SB 3133 (SB 3040 by Senator Lloyd Bentsen of Texas) and have continued to urge the passage of the corrective legislation to preserve this industry. We ask that our position be made a part of your official hearing record.

VIRGIL MUSICK, *Administrative Secretary,*
Texas Soft Drink Association.

ALBANY, N.Y., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.

The membership of the New York State Soft Drink Association strongly and seriously support the industry franchising bill S. 3133. We ask that this unequivocal statement be made part of the official hearing record. Copy sent to Sen. James O. Eastland, chairman, Senate Judiciary Committee.

DANIEL S. STONE,
Executive Director, New York State Soft Drink Association.

CHARLESTON, W. VA., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

For your information, the W. Va. Soft Drink Association unanimously supports the industry's franchising bill S. 3133. You can quote us officially in your hearings or enter this wire as part of the official records of that hearing.

WEST VIRGINIA SOFT DRINK ASSOCIATION,
JAMES L. MCWHORTER, *President.*

MONTGOMERY, ALA., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, U.S. Senate Antitrust and Monopoly Subcommittee of the Committee on the Judiciary, Washington, D.C.:

The Alabama Soft Drink Association, composed of Alabama small businessmen, strongly endorses and supports Senate bill 3133 and similar legislative proposals and respectfully requests that your subcommittee take favorable action thereon. Thank you for your consideration in this matter and we would also request that this telegram be made a part of the record in the hearings before your subcommittee.

ALABAMA SOFT DRINK ASSOCIATION.

HARRISBURG, PA., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

The Pennsylvania Soft Drink Association, representing nearly all franchises of independent soft drink manufacturers in Pennsylvania, urges your support of S. 3133. This association endorses S. 3133 wholeheartedly feeling that a legal definition of our way of doing business the only solution to regulatory harassment. Senator, we would be pleased to have this communication made a part of the official hearing record.

PENNSYLVANIA SOFT DRINK ASSOCIATION,
GEORGE H. GEISE, *Executive Secretary.*

DES MOINES, IOWA, *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

The Iowa Soft Drink Association strongly endorses and supports S. 3133 concerning franchising. Respectfully request this support of S. 3133 be made a part of the official hearing record.

J. S. CRAIGER,
Iowa Soft Drink Association.

CHATTANOOGA, TENN., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

The Tennessee Soft Drink Association and its members heartily endorse and support the industry franchising bill S. 3133 and wish to have this telegram become part of the official hearing records.

MORTON BRIGHTWELL,
President, Tennessee Soft Drink Association.

WILMINGTON, DEL., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

Delaware bottlers unequivocally endorse and support bill S. 3133. Request that this be made part of official hearing records.

CHARLES D. BROLL,
Vice-President, Pepsi Cola Bottling Co., of Wilmington, Del., for Delaware Bottlers.

COLUMBIA, S.C., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

The South Carolina Soft Drink Association endorses and supports the soft drink industry franchising bill S. 3133. Please make this statement a part of the official hearing record.

MARSHALL L. HOOKS.

NEWBURYPORT, MASS., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Washington, D.C.:

The Massachusetts Soft Drink Association strongly recommends favorable action on S. 3133 and request that this telegram be made a part of the official record.

JOHN F. LEARY, Jr., *President,*
Massachusetts Soft Drink Association.

SOUTH PORTLAND, MAINE, *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust Monopoly Legislation, Washington, D.C.:

The main bottlers Assn. representing 17 bottlers endorses and supports the industry franchise bill S. 3133. Our association further requests that the contents of this wire be made a part of the official hearing record.

NORMAN L. FOGG, *Secretary,*
Maine Bottlers of Carbonated Beverages.

HOBBS, N. MEX., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antirust Monopoly Legislation, Washington, D.C.:

The New Mexico Soft Drink Bottlers 100 percent support passage to the industry franchise bill S. 3133. This bill will benefit far more people without franchise small and medium bottlers and business will bé out of the soft drink business. Please make this a part of the official hearing record.

A. M. BARTLETT, *President,*
New Mexico Soft Drink Association.

MANCHESTER, N.H., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antirust Monopoly Legislation, Washington, D.C.:

DEAR SENATOR HART: The New Hampshire Soft Drink Association wishes to inform the Senate Subcommittee on Antitrust and Monopoly Legislation that it is fully in favor of the industry franchising bill S. 3133. The association voted unanimously for the proposed bill at its last meeting. We at the New Hampshire Soft Drink Association hope most sincerely that the honorable Senator will push, and I respectfully request that this telegram be read into the official hearing record.

Sincerely,

MARC A. JOLICOEUR, *Secretary,*
New Hampshire Soft Drink Association.

LITTLE ROCK, ARK., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

Please be advised of the enthusiastic support of the Arkansas Soft Drink Association for the soft drink industry franchising bill S. 3133. The Arkansas Soft Drink Association vigorously supports this proposal (S. 3133) because it will strengthen our industry, benefit the consumer, and help to provide the proper ecology for America. We respectfully ask that this message be made a part of your committee's official record of the hearings of this measure.

ARKANSAS SOFT DRINK ASSOCIATION,
F. M. BELLINGRATH, *President.*

SEATTLE, WASH., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

Please advise that the Washington State Soft Drink Association endorses and strongly supports industry's franchise bill, S. 1333. Kindly advise your committee of the Washington State Bottlers' keen interest in this bill. Also request this telegram be made a part of the official hearing record.

WASHINGTON SOFT DRINK ASSOCIATION,
JOHN E. HASSLINGER, *President.*

RAPID CITY, S. DAK., *September 19, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

The South Dakota Bottlers Association is indeed very much in favor of the franchise bill S. 3133. We request this telegram be made a part of the official hearing record. If there is anything further we can do, please advise.

SOUTH DAKOTA BOTTLERS ASSOCIATION,
MIKE MESSINGER, JR., *President.*

OKLAHOMA CITY, OKLA., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly,
Washington, D.C.

This is to advise your committee that the soft drink industry unanimously supports Senate bill 3133. I know of no bottler in the State who does not encourage you to report this bill favorably out of your committee. We request that this unanimous support by the Oklahoma Bottlers of Carbonated Beverages be made a part of the official hearing records.

OKLAHOMA BOTTLERS OF CARBONATED BEVERAGES,
CLYDE INGEL, *President.*

COLUMBUS, OHIO, *September 18, 1972.*

Senator PHILIP A. HART,
Senate Subcommittee on Antitrust Monopoly Legislation,
Washington, D.C.

Please be advised that the Ohio Soft Drink Association's 222 members unanimously endorse and support the industry franchising bill S. 1333. Ohio Association members have instructed me to request that the contents of this telegram be made part of the official record. One of the major concerns in our Association with respect to its modern history has been the challenge to the franchise system. We urge your committee's most thoughtful consideration to the industry's proposed legislation.

OHIO SOFT DRINK ASSOCIATION,
JEROME G. HARMELING, *President.*

SPRINGFIELD, ILL., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust Monopoly Legislation,
Washington, D.C.

The Illinois Soft Drink Association representing over 100 Illinois soft drink bottlers unqualifiedly endorses S. 3133. In so doing, the association joins the many Senators and Congressmen who have introduced or sponsored this legislation. We further subscribe to the testimony presented to your subcommittee by Mr. Crawford Rainwater, president of the National Soft Drink Association and other proponents. Their testimony detailed the need for this legislation and cited the disastrous effect upon the soft drink industry and the resulting increased cost to consumers should the Federal Trade Commission be permitted to restructure our industry. We request that the contents of this telegram be made a part of the official hearing record of the Subcommittee on Antitrust and Monopoly Legislation.

Thank you,

ILLINOIS SOFT DRINK ASSOCIATION, INC.,
CHARLES W. BROSCH, JR., *Executive Director.*

TUSTIN, CALIF., *September 18, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation,
Washington, D.C.:

We wish to advise you and your committee that the members of the California-Nevada Soft Drink Association are wholeheartedly in support of the industry franchising bill S. 3133 and that we wish the contents of this wire to be made a part of the official hearing records.

CALIFORNIA-NEVADA SOFT DRINK ASSOCIATION,
HAVILAND G. ROGERS,
Executive Director-Secretary.

PIKEVILLE, KY., *September 19, 1972.*

PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust Monoply Legislation, Washington, D.C.:

DEAR SIR: This is to advise that the Kentucky Soft Drink Association strongly endorses and supports the industrial franchising bill 3133 and it is our desire that the contents of this telegram be made a part of the official hearing record.

KENTUCKY SOFT DRINK ASSOCIATION,
SOUTH WHITT,
Secretary.

WORLAND, WYO., *September 19, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

The Wyoming Soft Drink Association consisting of 12 small bottling companies, eight of which maintain and operate bottling lines in Wyoming and four operating bottling lines in adjoining States earnestly support Senate bill S. 3133 for the salvation of 12 small businesses in the sparsely populated State of Wyoming. We urge your committee's consideration of this bill before Congress adjourns next month. It is requested that this endorsement be made a part of the official hearing record. We in Wyoming need your help.

WYOMING SOFT DRINK ASSOCIATION,
NEWELL B. SARGENT,
Secretary.

ASHEVILLE, N.C., *September 19, 1972.*

Senator PHILIP HART,
Chairman, U.S. Senate Antitrust and Monopoly Subcommittee Committee on the Judiciary, Washington, D.C.:

The membership of the North Carolina Soft Drink Association strongly supports and endorses S. 3133 and similar bills to preserve territorial provisions, in our franchised agreements. Unless such legislation is passed our industry in North Carolina stands to loose a large and a significant number of it manufacturing plants. Your support for the bill will be wholeheartedly appreciated.

NORTH CAROLINA SOFT DRINK ASSOCIATION,
SAM L. WHITEHURST,
Executive Director.

CHEVERLY, MD., *September 19, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust Monopoly Legislation, Washington, D.C.:

District of Columbia Soft Drink Association comprised of the following bottlers Canada Dry, Pepsi Cola, Rock Creek, Royal Crown, 7Up, endorses and fully supports the industry franchising bill No. S. 3133. Sincerely request that this endorsement be made a part of your official hearing record.

DISTRICT OF COLUMBIA SOFT DRINK ASSOCIATION,
CECIL B. GILLIONS,
President.

MINOT N. DAK., *September 20, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

Please be informed that our North Dakota Bottlers Association representing 100 percent of our State bottlers unanimously endorse and support the industry

franchising bill as 3133 please have contents of this telegraph be made a part of the hearing record.

NORTH DAKOTA BOTTLERS ASSOCIATION.
KENNETH L. MILLER,
President.

FAIRFIELD, CONN., *September 19, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Committee on Antitrust and Monopoly Legislation, Washington, D.C.

Overwhelming majority of Connecticut Soft Drink Association members fully endorse and support the soft drink industries franchising bill S. 3133 presently before your committee we urgently request that it be favorable voted out of committee and onto floor of Senate. Further request this telegram be made a part of the official hearing record.

CONNECTICUT SOFT DRINK ASSOCIATION,
WILLIAM J. LEADER, Jr.,
President.

EAU CLAIRE, WIS., *September 19, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.

At a recent meeting of the executive board of our State association the following motion was made, seconded and unanimously passed that the members of the Wisconsin Soft Drink Association endorses and support bill S. 3133 and request that this telegram be made a part of the present official hearings now before the committee.

WISCONSIN SOFT DRINK ASSOCIATION,
MARSHAL L. HUGHES,
Executive Secretary.

FRANKFORT, IND., *September 19, 1972.*

Senator PHILIP A. HART,
Chairman,
Washington, D.C.

On behalf of the Indiana Soft Drink Association whose membership numbers 71 out of a possible 76 soft drink bottling plants and warehouses in the State of Indiana we would like to wholeheartedly endorse bill S. 3133. The soft drink industry and its franchise system has been in practice for well over 70 years and any change in this established legal practice would cause a financial hardship on many of the small businesses both in our industry and those doing business with our industry. All of the bottlers in Indiana on whose behalf we speak sincerely request your support of S. 3133, and request this wire be made a part of the official hearing record.

INDIANA SOFT DRINK ASSOCIATION,
THOMAS B. SCHIEDLER,
Secretary Treasurer.

Burlington, Vt., September 19, 1972.

Senator PHILIP A. HART,
Washington, D.C.:

The Vermont Soft Drink Association strongly endorses S. 3133. Please make this telegram a part of the official hearing record.

VERMONT BOTTLERS ASSOCIATION,
JAMES FAYETTE,
President.

SALEM, OREG., *September 20, 1972.*

Senator PHILIP A. HART,
Chairman, Subcommittee on Antitrust and Monopoly,
Washington, D.C.:

The Oregon Soft Drink Association would like to go on record as supporting Senate bill S. 3133, which your committee is deliberating.

The franchise system is a sacred trust to the small businessmen of the United States. Passage of this bill will assure the preservation of our buiness in the State of Oregon from the encroachment of larger monopolistic companies. The franchise system is the last leg of free enterprises system for the small man. Let me assure you that our association is solidly 100 percent behind your committee's bill S. 3133. Please make this telegram a part of the official hearing record.

OREGON SOFT DRINK ASSOCIATION,
JIM RABE,
Secretary.

ST. LOUIS, MO., *September 20, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation,
Washington, D.C.:

The Missouri Soft Drink Association endorses and supports the industry franchising bill S. 3133, and requests that this be recorded in the official hearing.

MISSOURI SOFT DRINK ASSOCIATION,
AUDBREY B. CASE,
President.

JACKSON, MISS., *September 20, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation,
Washington, D.C.:

The Mississippi Soft Drink Association and all of its members wholeheartedly endorse and support the industry franchising bill S. 3133, now being considered by your SCS-Committee and respectfully urges favorable consideration by your committee.

Request is also hereby made that this telegram be made a part of the official hearing record.

MISSISSIPPI SOFT DRINK ASSOCIATION,
ROBERT A. BIGGS, Jr.,
Executive Vice President.

BUTTE, MONT., *September 21, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

The Montana State Soft Drink Association strongly urges passage of Senate bill 3133 and that our support of Senate 3133 be made a part of the official hearing record. Our membership consists of twenty small businessmen in a State with few people, extreme weather conditions, and distribution problems covering many miles.

MONTANA SOFT DRINK ASSOCIATION,
DONALD HARRINGTON,
Secretary.

HASTINGS, NEBR., *September 21, 1972.*

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly Legislation, Washington, D.C.:

This message is the conclusion of Nebraska Soft Drink Association whose entire membership is in support of S. 3133, the industry franchising bill. Please make this finding a part of the official billing record.

NEBRASKA SOFT DRINK ASSOCIATION,
FRANK C. BOYD,
President.

PEPSI-COLA BOTTLING CO. OF OSHKOSH, INC.,
Oshkosh, Wis., September 12, 1972.

Re Senate bill No. 3133

Hon. GAYLORD NELSON,
Senate Office Building
Washington, D.C.

DEAR SENATOR NELSON: Please refer to the hearings now in progress before the Senate Antitrust and Monopoly Subcommittee. Also, please refer to my letter dated June 2, 1971, in regard to our position in this matter.

It is our understanding that the Senate will adjourn on September 30. We feel it is imperative that the present bill under consideration be voted upon by the committee before September 30.

I would appreciate it if you would contact Senator James Eastland and Senator Philip Hart in our behalf in this matter.

Thank you very much for your consideration and cooperation in this matter.

Very sincerely yours,

PEPSI-COLA BOTTLING CO. OF OSHKOSH, INC.,
DONALD O. BELOW, *President.*

PEPSI-COLA METROPOLITAN BOTTLING CO., INC.,
Milwaukee, Wis., September 13, 1972.

Hon. GAYLORD A. NELSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR NELSON: It is our understanding that the Senate will adjourn on September 30. We feel that it is imperative that Bill No. 3133 be voted upon by the committee before this adjournment. Please contact Senator Philip Hart, Sub-Committee Chairman, and Senator James Eastland, Committee Chairman, on our behalf, and impress upon them the importance of this action.

Very truly yours,

JOHN O'DONNELL,
Vice President, Area Manager.

PEPSI-COLA BOTTLING CO. OF KENOSHA AND RACINE,
Kenosha, Wis., September 15, 1972.

Re S–3133.

Senator GAYLORD NELSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR NELSON: Again, I must ask a favor of you because it is extremely important.

Will you please contact Senators Philip Hart and Eastland to encourage them to vote the softdrink bill referred to above, out of committee before September 30, 1972, else we have virtually wasted many thousands of dollars.

We who have invested heavily in buildings, bottling machinery, vehicles and most importantly, in people could never have done so without the franchise contract we hold. Further, we consider our Pepsi-Cola franchise agreement to be a legal, moral and ethical document.

Your assistance in this matter will be much appreciated.

Sincerely,

T. BERNARD DUNLAP,
Owner-Manager.

[From the Advertising Age, Sept. 11, 1972]

Coffee Market Continues to Erode; Soft Drinks Now Favorite Beverage

(By John C. Maxwell, Jr.)

New York, Sept. 6.—For the first time coffee has fallen from first to second place in per capita consumption, behind soft drinks. Besides our new life styles, which tend away from all hot drinks, part of the problem lies in the coffee industry itself. Coffee companies appear to be doing little innovative research themselves, with almost all being farmed out to the Pan American Coffee Bureau and others.

To our knowledge, this $1.5 billion industry has formulated no real plan to reverse the decline in consumption, nor is it sure of the size or shape of the industry as it is now constituted, except in the most general terms.

The percentage of persons drinking coffee has continued to erode, whereas practically all other drinks have shown at least some minimal increase, and soft drinks and fruit drinks have demonstrated a major upward movement (See Table I).

The market may be broken down into three separate units: (1) Ground regular; (2) soluble (spray dry and freeze dry); (3) decaffeinated (including ground, freeze dry and spray dry types).

The last group has been growing about 9%–10% per year, with General Foods' Sanka holding 90% of the market. Sanka's national competitor has been Nestle's Decaf (spray dry). Now Nestle is moving into some regions with Taster's Choice Decaffeinated (freeze dry), to compete in the decaffeinated area. Obviously, a battle of giants is shaping up here, and the outcome will be very important to General Foods.

It is interesting to note that a recent study by the Pan American Coffee Bureau indicates that more women than men drink decaffeinated coffee, and only 8% is consumed after dinner, whereas 49% is used at breakfast.

Soluble coffee may be divided into two distinct groupings: (a) Spray dried, broken down between agglomerated and non-agglomerated, and (b) freeze dried. Industry growth in the past has been about 4% annually, although there are signs this rate may be increasing.

Usage of non-agglomerated spray dry coffee is dropping swiftly. Most of the major producers have switched to agglomerated over the last year or two, and agglomerated types now have over 70% of the market. This improved product is similar in quality characteristics to the freeze dry process. It is cheaper to make than freeze dry, and the conversion of plant and equipment from manufacturing nonagglomerated to agglomerated is less difficult than a shift to freeze dry. For the approximately 70% of coffee drinkers who use sugar and/or cream, the taste is comparable with that of freeze dry.

In recent years the Maxwell House label has been increasing its instant market share, and in 1971 increased to almost 27% versus last year's 24.8% of the total instant market. Besides Nestle and Folger's, the main competition is private label, totaling about 15%, with A&P being the most important. General Foods' Maxim has continued to lose market share in the freeze dry area, and is now probably stabilized at about 8%, with Nestle's Taster's Choice up to 11% nationally, and where they are marketing, it is about 14%.

In the regular market, General Foods' brands have maintained market share, but are now being challenged by P&G's Folger's, which is slowly but surely penetrating eastward, and has just entered the Ohio market. It is now sold in about 60% of the country. In addition, part of the consent decree restricting Folger expansion expires in February, 1973; therefore the company could make new moves after that.

The market for regular has been trending downward by 3%–4% per year; however, there are signs that it may be leveling off. General Foods has been particularly innovative in the regular area with Max-Pax, a premium-priced portioned filter ring of roast and ground coffee for home use in percolators and Electra-Perk.

In test market is Brim, a second decaffeinated coffee in both ground and dry; and more recently Master Blend, which is a combination of spray dry and freeze dry, allowing for a lower price.

APPLIANCE GROUP SETS COMPETITION DEADLINE

Deadline for entries in Assn. of Home Appliance Manpfacturers' annual ALMA awards competition is Sept. 30. Consumer appliance advertising which ran between Sept. 1, 1971, and Aug. 30, 1972, is eligible. Categories are newspapers, consumer magazines, radio and television and utilities and extension service. Entries should be submitted to the association at 20 N. Wacker Dr., Chicago 60606.

TABLE 1.—LIQUID CONSUMPTION TRENDS IN THE UNITED STATES

[Gallons per capita per year]

	1971	1970	1969	1968	1967	1966	1965	1964	1963	1962
Soft drinks	34.8	32.8	30.5	28.8	26.6	25.6	23.1	21.7	20.3	19.1
Coffee [1]	34.7	35.1	36.4	37.3	37.8	37.0	37.1	38.0	38.8	39.2
Milk	24.9	25.0	25.3	25.6	25.3	25.9	26.0	25.9	25.8	25.6
Beer	19.1	18.4	17.8	17.3	16.8	16.1	16.1	15.6	15.1	15.2
Tea	7.2	6.9	6.6	6.6	6.4	6.6	6.4	6.2	6.1	6.1
Juices	5.0	4.8	4.5	4.2	4.4	3.7	3.5	3.2	3.6	4.1
Distilled spirits	1.9	1.8	1.8	1.7	1.6	1.6	1.5	1.4	1.4	1.4
Wine	1.5	1.3	1.2	1.1	1.0	1.0	1.0	1.0	0.9	0.8
Subtotal	129.1	126.1	124.1	122.6	119.9	117.5	114.7	113.0	112.0	111.6
Imputed water consumption [2]	53.4	56.4	58.4	59.9	62.6	65.0	67.8	69.5	70.5	70.9
Total	182.5	182.5	182.5	182.5	182.5	182.5	182.5	182.5	182.5	182.5

[1] Changes in coffee figures are the result of changes made by the Pan American Coffee Bureau in conversion rates
[2] Includes all other.

Sources: USDA; USBA; Maxwell Reports, Pan American Coffee Bureau.

TABLE II.—ESTIMATED COFFEE MARKET SHARE BY COMPANY

[In percent]

	Regular coffee				Instant coffee			
	1968	1969	1970	1971	1968	1969	1970	1971
General Foods:								
Maxwell House [1]	24.0	24.0	24.0	24.0	27.5	23.5	24.8	26.9
Maxim					10.0	13.0	10.5	8.2
Sanka	3.0	3.2	3.2	3.7	11.5	8.8	9.0	10.5
Yban	2.0	2.2	2.2	2.2	4.0	4.0	2.7	2.7
Freeze-Dried Sanka						2.5	4.5	4.7
Total	29.0	29.4	29.4	29.9	53.0	51.8	51.5	53.0
Procter & Gamble: Folger's	18.0	19.5	19.8	20.0	7.5	7.4	7.9	7.7
Hills Bros	12.5	11.5	10.3	9.3	2.5	1.8	1.5	1.3
Standard Brands: Chase & Sanborn	5.5	5.5	5.5	5.2	4.0	3.2	3.2	3.1
Nestle:								
Nescafe					11.5	11.0	11.0	11.0
Taster's Choice					1.0	4.0	10.5	11.0
Decaf					1.5	1.5	1.5	1.3
Total					14.0	16.5	23.0	23.3
Borden: Kava					1.0	1.5	1.3	1.2
Coca-Cola Co.:								
Maryland Club	2.5	2.0	1.7	1.6				
Butternut	3.0	3.0	2.7	2.6				
Total	5.5	5.0	4.4	4.2				
Savarin	1.5	1.0	.8	.8				

[1] Electra-Perk is roughly 6 percent in all years.

TABLE III.—PERCENTAGE OF PERSONS DRINKING COFFEE AND OTHER BEVERAGES

	1950	1962	1965	1966	1967	1968	1969	1970	1971	Change 1960–71
Coffee	74.7	74.7	71.4	70.9	71.4	69.6	68.2	67.6	67.2	−10.1
Milk and milk drinks	51.0	52.6	54.0	53.2	52.2	50.5	52.5	51.2	51.4	+0.8
Fruit and vegetable drinks	32.8	41.4	38.8	40.4	40.7	42.0	44.6	41.7	43.4	+32.3
Soft drinks	29.1	32.6	37.8	39.0	40.3	41.8	43.9	42.7	45.0	+54.6
Tea	24.0	24.7	25.5	25.9	24.5	24.1	25.0	26.6	25.9	+7.9
Cocoa, hot chocolate	5.4	4.5	3.9	4.1	2.6	3.6	3.2	2.7	2.8	−48.2

Source: Pan American Coffee Bureau.

Fact Statement in Support of Legislation Upholding Exclusive Territorial Arrangements in the Soft Drink Industry

(Submitted In Support Of Testimony Of John R. Strachan, President Of Pepsi-Cola Bottlers Association, And Based In Part Upon Information Supplied By Pepsi-Cola Company, Dated: August 3, 1972)

I. Introduction

The unwarranted attack by the Federal Trade Commission (FTC) upon one of the last bastions of the small businessmen—the soft drink bottling industry—is actually anticompetitive and subversive of our national economic goals. Perhaps, if great economic benefits to the economy could be demonstrated, the FTC might be justified in destroying a business structure, unchallenged for three-quarters of a century, which is the foundation of the existence of thousands of local independent bottling firms. No such economic benefits can be expected. Indeed, the reverse—injury to the economy—can be shown to be the natural consequence of the FTC's effort to restructure this industry.

To begin with, history demonstrates that territorial franchising in the soft drink industry has beneficially served the economy. As a result, where once the industry was nationally dominated by a single cola drink in a small bottle, there is now a proliferation of brands in a wide variety of sizes and containers. This has been achieved in a market context of vigorous competition which has kept current prices far below levels consistent with the inflationary pressures of modern time.

The granting of territorial franchises is what induced independent businessmen to become producers and distributors of specified branded beverages. Territorial security was the bedrock upon which bottlers staked their investments in plants, bottling and vending equipment and delivery trucks, and provided incentive for their contractual undertaking to develop and promote demand for their products in the areas they serve. In these local markets, they compete with bottlers and sellers of other brands in the belief that the good-will and acceptance they build for a given brand will not be siphoned away by an invading bottler of the same brand.

The FTC has instituted proceedings and has proposed orders designed to invalidate these territorial provisions. This alone has already undermined bottlers' financial security and clouded their future. But beyond this, the inevitable result of the FTC position will be an *increase* in soft drink prices, a *reduction* in the distribution and availability of soft drinks and a *shrinkage* in competition coupled with the seizure of the bottling business by large public corporations. The chain of events which will follow if the FTC is successful is summarized below:

1. Under the present distribution system, a bottler delivers his products within his area on a store-door and equivalent price basis both to the giant food chain supermarkets as well as to the small grocers, convenience outlets, gasoline stations and general stores. In the absence of territorial provisions, food chains could purchase branded soft drinks for storage in their central warehouses and from there make their own store deliveries throughout the chain system and regardless of territory. The FTC features this alteration in distribution chan-

nels evidently without realizing that the effect can only be to the advantage of the larger bottlers and to the ruin of the smaller ones. It is a fact that chain warehouses are principally located in the areas of the larger bottlers. These powerful bottlers have the capacity to supply the entire trade area of the chain, have the resources to underbid their smaller rivals for this business, and have the advantage of proximity to the warehouses. (See III.A., *infra.*)

2. It is folly to suppose that a small, outlying bottler will overcome his big-city rival in the race for this business. As demonstrated hereafter, soft drink bottling is a capital intensive industry in which the minimum investment for expansion is over fifty cents for each additional sales dollar. The smaller bottlers just do not have the wherewithall for such expansion. Many are heavily indebted and have little equity. They are no match for the conglomerates and public corporations which are already in the bottling business and which have sophisticated management and financial strength. (See III.C., *infra.*)

3. As the central warehouse business is captured by the powerful, what becomes of the losers? Under the existing distribution structure each bottler services the chain stores within his area. These high volume, large-drop accounts, while representing less than half of a bottler's dollar sales, are the cream of his business. The chain store sales generate the funds which balance the much less profitable distribution to the myriad of small grocers, convenience stores, gasoline stations, vending machines and kindred outlets which collectively account for the enormous availability of soft drinks. Once the chain store cream is skimmed by the big bottler who has won the race to the central warehouse, little remains to the loser but his high cost, low volume customers. (See III.C., *infra.*)

4. To compensate for the loss of chain store revenue, a bottler has limited alternatives. If he continues store-door delivery, higher prices to his remaining customers alone will replace these revenues; and higher prices alone will enable him to continue serving a variety of low volume outlets which, nevertheless, collectively represent the bulk of his sales. The alternative, if it existed, would be to reduce costs by discontinuing store-door delivery and engraft soft drinks onto some existing channel of distribution which already serves these outlets with other products But, there is no such channel which can accommodate soft drinks. The effort to expand such a channel, or to create a new one, considering the weight and bulk of bottled and canned soft drinks, would founder on the same adverse economics as confronts the bottler in the first place. In short, if a bottler presently having both the delivery equipment and the customer relationships cannot, within the existing price structure, profitably maintain distribution to his many low volume accounts, no other channel of distribution can successfully do so. (See II.C., *infra*)

5. Limited, then, to continuing bottler store-door deliveries to low volume outlets, but at increased prices, what will the effect be? First, these outlets will find themselves at a competitive disadvantage to the chains as they in turn raise their prices to consumers. Some no doubt will continue to find patronage at the higher price level, but the public will pay the bill. Others will see demand diminish to the point where their handling of soft drinks will no longer be advantageous. Their profits, too, will shrink as they are forced to discontinue this prior source of revenue. At the same time, the consumer will be deprived of the previously enjoyed ready availability of soft drinks at competitive prices. (See III.C., *infra.*)

6. Nor will there be benefits to consumers at the chain supermarkets. Central warehouse distribution of national brand soft drinks will in fact impose new costs on the consumer. Central warehousing is feasible only in non-returnable containers. These are what the chains prefer, if not insist upon, and it is these, primarily cans, in which they package their private label soft drinks. As demonstrated within, it is the returnable bottle, particularly in the larger sizes, which is the consumer's best buy. So much is this true that a shopper today can enjoy virtually the same value per ounce for national brands of soft drinks in 16 oz. returnables as for private labels and as for *Coca-Cola* twenty years ago. The use of returnable bottles, however, is dependent upon territorial franchises and on store-door delivery. Returnables cost more initially, but more than pay their way if repeatedly reused. Premature loss or destruction wastes an asset. Accordingly, a bottler will not ship returnables into an area served by a competing bottler of the same brand or where he does not deliver store-door. To do otherwise is to lose control over and risk loss of a valuable bottle inventory. Thus, if bottlers of the same brands are to sell in each others' territory, they will do so only in non-returnables. So also, if national brand drinks are to be distributed by chains

through their central warehouses as are their private labels, there will be no returnables on the shelves of supermarkets and chain food stores. The option which consumers now enjoy of purchasing branded soft drinks at relatively low prices in returnable bottles, now available under franchise, store-door distribution, cannot survive if the FTC strikes down territorial exclusives. The public will then be saddled with the enormous increased cost of non-returnable containers as more volume switches to them. The public will doubly pay by shouldering the burden of disposing of these additional cans and bottles as they compound existing ecological problems. (See pp. 24–28 and III.B., *infra.*)

7. There is thus no evidence that central warehousing of soft drinks would produce any general cost savings. Furthermore, there is no reason to suspect that any hypothetical economies would be passed on to consumers. The chain stores retail their own proprietary ("store—controlled") soft drinks and promote them aggressively, often taking shelf space from the national brands and placing their store-controlled drinks at eye level and giving them valuable end aisle displays. (See pp. 30–32, *infra.*) These store-controlled labels are often used as loss leaders and compete with national brands only because the cheaper costs of their ingredients and the chains' ability to ride the coattails of the advertising and market research of the national brands and shift the costs of distribution to other items allow them to be sold at a price differential from national brands. It is unlikely, to say the least, that the chain stores would willingly pass on to their customers any cost savings that would reduce the differential. In addition, because of the space and vehicles required to handle soft drinks through a central warehouse, the chains would drop slower moving soft drink products and carry only their own soft drinks and the two or three fastest selling national brands, with a consequent reduction in interbrand competition and in consumer alternatives at supermarkets. (See III.B., *infra.*)

8. Again, the economic burdens of the FTC's position do not stop here. It will lead to intense pressures upon bottlers which will stifle competion in a variety of other ways. Those powerful bottlers who have the resources to expand into neighboring territory will skim the cream with their most popular brands. In contrast, under the existing system bottlers have been required intensively to develop a particular territory. Accordingly, it has been to their advantage, when bottling a major brand such as *Pepsi* or *Coca-Cola*, to fill out their productive capacity with lesser volume items, for example, *Dr. Pepper*, *7-Up* and a variety of other national and local root beers, ginger ales and flavored drinks. This "piggybacking" provided the ease of entry for an array of competing brands in the market place. But, under the FTC's program, once large bottlers invade the high volume accounts of neighboring bottlers more and more of their facilities will be utilized to produce the fast moving colas. If they can skim the cream with their most popular brand, they will have little incentive to devote disproportionate resources to cultivate a market for slower moving drinks. As the advantages of "piggybacking" diminish, so too will the number of competing brands and of options to consumers. Also, once the source of a particular brand in a given area can no longer be attributed to a given bottler, incentives for quality control are lessened. As the bottler source of a brand becomes obscure, the responsibility to maintain high standards is weakened—all again to the detriment of the consumer. (See III.E. and pp. 39–41, *infra.*)

9. As powerful bottlers spread out with their leading brands, can their weaker neighbors, confronted by loss of their highest volume accounts and forced to raise prices to a shrunken remainder of their trade, be expected to survive? Those with the weakest financial structure, finding borrowing costs higher due to loss of franchise protection, will be the first to collapse. In one stroke, they will lose to an invader years of investment in building the good-will of their branded products in their local area. It will be captured by an outsider who has invested nothing in developing the local acceptance of those products. Instead of the orderly evolution toward consolidation brought on in recent years under the pressure of competitive forces and increased capital requirements, the bottling business will be thrown into chaos overnight. Until now, a bottlers' exclusive franchise had value. His neighbor could not force him out of business; and if the dynamics of economic change militated in favor of a disposition of his business he could expect a fair price. A bottler who had developed his territory had a valuable asset which he could pass to his descendants or realize in his lifetime. The FTC would change this. It would deprive a small bottler of territorial protection and thereby place him at the mercy of more powerful ones. The public corporations need not acquire him, they can just put him out of

business. And as bottlers collapse, so also will competition. With fewer bottlers there will be fewer "piggybacking" opportunities, fewer plants in which local drinks and slower moving brands can be produced, fewer choices for the shopper on the store shelves and fewer products to compete in price. Moreover, as bottlers fall by the wayside, distribution of soft drinks will shrink as low volume outlets lose their sources of delivery, and the consumer will be confronted by less availability. (See III.D. and E., *infra.*)

10. As the number of brands are reduced and interbrand competition diminishes, as fewer and fewer bottlers survive, and as the large public companies and conglomerates take over, are prices going to be reduced? The FTC staff is the author of the statement: "Concentration levels are correlated with competition—the higher the concentration level, the lower the degree of competition and the higher the price level" *. Even were this proposition correct—and it remains to be proved empirically **—the most frustrating aspect of the FTC position is its blindness to reality—its unwillingness to perceive that its proceedings against the soft drink industry must necessarily have the very effects which it wishes to avoid. Suddenly to restructure this industry to accomplish the FTC's theoretical ambition to increase the number of bottlers who can compete in an area, will only mean that the powerful will expand, the weak will succumb, and the concentration level will increase along with prices. At the same time, businessmen will go broke, employees will lose jobs, investment and market growth will be restricted, and resources will be dislocated.

In short, it remains for Congress to save the public from the FTC's folly. There are no gainers from the FTC program. Consumers will suffer, businesses will fail and public objectives will be blunted. Instead of increasing competition and distribution and reducing prices, the FTC will have destroyed the very forces which have produced these results in the past. It is these compelling reasons which, despite their otherwise separate interests, have united franchisees to seek and franchisors to support this legislation.

II. Evolution of Franchising and Growth of Competition in the Soft Drink Industry

A. THE BEGINNINGS AND DEVELOPMENT OF THE SOFT DRINK INDUSTRY IN THE UNITED STATES

During the second half of the 19th Century, a number of soft drinks were introduced and sold generally over drugstore counters, some of which are still well known today, such as:

Hires Root Beer	1876
Clicquot Club	1881
White Rock	1883
Coca-Cola	1886
Dr. Pepper	1888
Pepsi-Cola	1895

At the beginning of the 20th Century—with the availability of compressed carbon dioxide in cylinders, crown cappers, machine-made bottles, trucks and equipment—the nature of the soft drink industry changed dramatically.*** Between 1900–1929, per capita consumption of the soft drink beverages increased 4½ fold—from 12 bottles to 53 annually.

In 1940, *Coca-Cola* enjoyed a 53% share of the total soft drink market and it was outselling *Pepsi* 5 to 1.**** As summarized in the Shih study, "[b]efore 1950,

*Statement In Opposition to S–3040, etc., p. 11, March 31, 1972.

***B. Bock, Concentration, Oligopoly, and Profit: Concepts v. Data,* 30 (1972); *Economic Concentration: the Perennial Fall Guy*, pp. 12, 14–15 (First Nat'l City Bank, April 1972).

***In the early 1900's "developments of immense importance to the growth of the [soft drink] industry included the mechanization of glass manufacturing, transition from hand-blown to machine made bottles, conversion to lined and decorated crown closures, and new filling machines that could bottle 100 drinks per minute." American Can Company, *Carbonated Beverages in the United States—Historical Review* (1972) p. 13 (hereinafter "American Can Report".)

****Shih and Shih, *American Soft Drink Industry and the Carbonated Beverage Market,* 72 (1965) (hereinafter the "Shih Study"). The Shih Study has been cited by the FTC staff in support of arguments made in its presentation to the Senate and House Committees and one of its authors has been named by counsel in support of the FTC complaints as one of their witnesses who will testify in the pending soft drink cases about the history and general structure of the soft drink industry. While our citation of the Shih Study in this submission should not be taken as an endorsement of conclusions of the study with which we disagree, it will be used as a source which the FTC staff surely cannot challenge to document uncontroversial historical facts which are in accord with our own knowledge of the soft drink industry.

no other company in the industry had offered any real competition to Coca-Cola's leadership. . . . In the United States Coke had established its franchise empire long before other companies had entered the national scene." Shih Study at 72, 74. Pepsi-Cola Company was a relatively late entry into the soft drink field, not having come on the scene until about the turn of the century, when Coca-Cola was already well established.*

Throughout this period of the 1930's and 40's until the end of World War II the single most important characteristic of the soft drink industry was Coca-Cola's command of the national market. Because of its early entry into the business, its unique package and its popular advertising, Coca-Cola was able to preempt the field. Its commanding position was further strengthened through sales to American troops overseas during World War II.

B. THE ROLE OF THE FRANCHISE SYSTEM IN BUILDING COMPETITION IN THE SOFT DRINK INDUSTRY

Through the 1930's and 40's when Coca-Cola dominated the soft drink market and Pepsi-Cola and other smaller companies were struggling to survive, the franchise system, with its guarantee of exclusive territorial rights, was the means which enabled competition to grow and make inroads on Coca-Cola's monolithic strength. In 1931, Pepsi-Cola was bankrupt and its assets had been sold by the trustee for $10,500. A new Pepsi-Cola Company formed in that year was so unsuccessful during the next two years of its operation that during 1933 its chief executive sent an emissary to Atlanta with an offer to sell out to Coca-Cola. At last, at the end of 1933, Pepsi-Cola hit upon a successful marketing strategy—sale of *Pepsi* in 12 oz. bottles for the same 5¢ price charged for 6½ oz. bottles of *Coca-Cola* and a vigorous drive to recruit independent franchises.

In 1932 and 1933, *Pepsi-Cola* had been bottled for the Pepsi-Cola Company and was sold principally in the New York metropolitan area. Arrangements were made for bottling *Pepsi-Cola* in a few other cities in 1934. But by the end of 1934, it became apparent that Pepsi-Cola's new found success with its "twice as much for a nickel" strategy could become permanent only if it were possible to build a large nationwide sales volume quickly. Pepsi-Cola Company, with its limited resources and distribution facilities, could not itself capitalize on the impact of its 12-ounce drink. Only franchising local independent businessmen to bottle *Pepsi* provided a solution to the problem.

Armed with the promise of exclusive territorial rights, Pepsi-Cola representatives sought out and persuaded local bottlers across the country to become Pepsi-Cola franchisees. After lining up the first new franchisee in late 1934, 73 additional franchises were added in 1935 and in 1936, 94 more.

The emergence of *Pepsi* as a nationally recognized cola drink depended on the network of independent bottler appointments issued in the mid-1930's. The franchise system was the cornerstone of Pepsi-Cola's steady campaign to become a viable, aggressive competitor to the Coca-Cola giant. The effectiveness of this campaign was in turn dependent on the determination, business acumen and financial stability of Pepsi-Cola's franchisees. In order to induce individuals with the requisite financial and managerial resources to establish a local bottling plant, effectively exploit market potential and win approval of this upstart cola drink by an oftentimes fickle consuming public, the Pepsi-Cola Company had to demonstrate its commitment to the franchisee's success.

This it did by granting the bottlers the exclusive right to bottle and sell *Pepsi* in their designated franchise areas—a right without which bottlers would have been unwilling to take on and promote a new drink. Appointment as a Pepsi-Cola franchisee meant that the local bottler must make a substantial capital investment in plant, bottling machinery, bottles, cases, trucks, equipment and supplies. He had to be willing to devote substantial personal and financial resources on behalf of a relatively unknown cola drink the ultimate acceptance of which in the national market was far from certain and to battle Coca-Cola which had been even further entrenched by the recent bankruptcy of the predecessor Pepsi-Cola Company. Surely no businessman would have wanted to make such an investment or to take on this fight unless he was assured that the rewards would be his if success were achieved. If he was to spend the time and money needed to develop a market for *Pepsi-Cola* in the territory served by his bottling plant,

*According to the Shih Study, "[a]s early as 1899, Coca-Cola had been distributed nationally, and as early as 1907, long before Pepsi stood up on its own feet, Coca-Cola had already started overseas expansion," p. 70).

nothing could be more natural than that he would insist on being the only bottler authorized to sell *Pepsi-Cola* in that territory. Without exclusive territorial rights there would have been no Pepsi-Cola franchise system and, without a franchise system, Pepsi-Cola would have been unable to achieve the nationwide sales volume essential to enable it to compete successfully with Coca-Cola.

As part of the effort to establish Pepsi as a nationally accepted cola drink, eight wholly-owned subsidiaries of Pepsi-Cola Company were formed during the period 1934–1937 for the purpose of operating Pepsi-Cola franchises in their states of incorporation. Some of these company-owned franchises were later granted to local businessmen, while the company retained franchises for the New York, Newark, Pittsburgh, Philadelphia, and Boston metropolitan areas.* They served to insure the presence of Pepsi-Cola in these important markets, expand its popularity and acceptance among consumers in those markets, and thus provide national availability of the product. As a result, businessmen became more interested in Pepsi so that by mid-1939 an additional 341 franchises had been granted.

Following World War II, and the initial success of Pepsi-Cola with a 5¢ price for a 12 oz. bottle ("Twice as much for a nickel"), financial pressure exerted by rising costs in every phase of the business made it impossible to preserve that retail price. Nevertheless, through continued marketing efforts on the part of bottlers and the company, the ratio of Pepsi sales to sales of Coca-Cola began an upward climb; and by the mid-1950's the latter's commanding lead in bottle sales of 5–1 over Pepsi in 1940 had been reduced to 2.5 to 1. By 1960, Pepsi had become a strong contender to Coca-Cola, having further reduced its lead in the total market to 2 to 1 and in food stores, where consumers can pick and choose freely between competing brands, Pepsi was outsold by Coca-Cola only 1.2 to 1.

The franchise system alone created the economic incentive for Pepsi-Cola bottlers to compete with their established Coca-Cola counterparts during the late 1940's and 50's. During this period Pepsi-Cola bottlers made huge investments in time and money, demonstrated their faith in the product by expending their own funds in advertising and promotional activity, and forsook immediate profits for the hope of long-range increases in the equity of their businesses. Ultimately they were successful. But if it had not been for the franchise system—if their territories had not been guaranteed by the Pepsi-Cola Company against invasion either by the franchisor or by other Pepsi-Cola bottlers—they would have had no incentive to make the needed investments or undertake the tremendous competitive effort required to overcome Coca-Cola's entrenched strength.

C. THE CONTINUED GROWTH OF COMPETITION IN THE SOFT DRINK INDUSTRY

Pepsi-Cola's successful incursion into the long-established stronghold of Coca-Cola and its emergence as a major challenge of Coca-Cola was the spearhead of the growth of vigorous interbrand competition in the soft drink industry. As explained in the Shih Study (at 72):

"Before 1950, no other company in the industry had offered any real competition to Coca-Cola's leadership. Since Pepsi's marketing strategy began to pay off in the 1950's, other companies have gradually found the paths to follow. At present, second-ranked companies have been growing, and competition has suddenly become a real phenomenon in the soft drink industry.

"Following the leaders, the second-ranked group of franchise companies—7-Up, Canada Dry, Royal Crown, and Dr Pepper—have been growing steadily since post World War II. . . .

"7-Up's sales have increased slowly but surely, since 1940. . . .

"Canada Dry's growth record has been impressive in terms of both dollar sales and case sales. . . .

"Between 1940 and 1964, Royal Crown's sales increased 10 times, the largest increase among the leading franchise companies (Chart 9.2.2). This has been largely because of its highly successful product, Diet Rite Cola, and its tremendous marketing efforts to create an industry trend. . . .

"The growth of Dr Pepper has been particularly impressive since Wesby Parker took over the presidency of the Company in 1955. In 1960, the distribution of its 'distinctively different' products was gradually expanded by an effective 'zone' marketing plan, state-by-state, region-by-region; and finally, the 'Friendly

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*References herein to "company-owned" franchises mean in general franchises held by wholly-owned subsidiaries of Pepsi-Cola Company.

Pepper-Upper' was distributed nationwide. Between 1960 and 1964, Dr Pepper sales increased more than 69 percent, the largest increase among all franchise brands."

More recently, TIME magazine reported that Dr Pepper, which "has been a staple for generations in the South and Southwest, but was unknown elsewhere five years ago", since "has expanded nationwide, taking chunks of such sophisticated markets as New York, Chicago, and Los Angeles away from Coke and Pepsi" (Page 39, issue of July 3, 1972).

To a large extent this continuing surge of growth by other companies to challenge Coca-Cola's leadership was made possible by established bottlers of the two major cola brands (*Pepsi and Coca-Cola*) adding the products of other franchise companies to their lines—thus diversifying and filling out their product lines and making possible maximum efficient use of their bottling and distribution facilities. By this means—known in the industry as "piggybacking"—bottlers and franchisors were enabled to meet the high cost of entry into the soft drink business, avoid the huge investment in construction of a new plant and in bottling machinery, and add needed revenues to absorb high fixed operating expenses. Incremental costs to an established bottler of a major line in taking on a new brand are minimal compared to the fixed costs absorbed by the bottler's major franchise and "piggybacking" thus allows a local bottler to operate his plant at full capacity with optimum efficiency and to achieve economies of scale. Without "piggybacking" the soft drink industry would be limited to high-volume brands and bottlers with substantial financial resources. With "piggybacking" small franchisors can enter the market with new brands without a substantial capital investment and bottlers who might otherwise fall by the wayside achieve sufficient volume to cover their costs and become profitable.

The incremental profit contribution made to the smaller *Pepsi* and *Coca-Cola* bottlers by secondary brands such as *7-Up*, *Dr Pepper* and others enables these bottlers to compete more effectively in their own territories. A good example can be found among Pepsi-Cola bottlers in the South. That area, where *Pepsi* is particularly weak in comparison to *Coca-Cola*, has the highest proportion of *Pepsi* bottlers handling *7-Up* or *Dr Pepper*.

Pepsi-Cola sales territories	Ratio of Pepsi to Coca-Cola sales in food stores	Percent of Pepsi bottlers with 7-Up and/or Dr. Pepper
Southern division	1.00:2.29	54
Balance of United States	1.00:0.79	40
Total, United States	1.00:1.03	43

Not only does the addition of secondary brands strengthen the bottler and allow him to compete in the market place, but it also increases national sales of the secondary brands and enables them to compete with the major brands on a more formidable level. For example, during the past two years, Dr Pepper's annual sales have increased from 120 million 8-oz. cases (1969) to 164 million 8-oz. cases (1971)—a gain of 36%. During the same period of time, the number of Pepsi-Cola bottlers handling this product has increased from 104 to 154—a gain of 51%. In other words, a large portion of Dr Pepper's growth has come about from expanding its marketing area by granting additional franchises to existing bottlers. The consumer has benefited from increased competition and the bottler has benefited from the sale of the secondary brand's products, which in turn promotes further competition.

The years between 1960 and 1970 were a period of rapid expansion, change and increased competition, in the soft drink industry. Total industry sales increased 100%, from an estimated 1.75 billion in (1960) to 3.5 billion cases* in 1970. At the same time annual per capita consumption of soft drinks increased 72%, from 237 bottles in 1960 to 408 in 1970. Chain food stores became increasingly important in the sale of soft drinks, accounting for roughly 50% of total sales of soft drinks in food stores as compared to 28.5% in 1960. Among the factors which were most influential and which led to an increasingly vigorous competition in the industry were the introduction of diet drinks, the development of non-returnable containers and entry into the market of a large number of low-cost store-controlled labels and new proprietary brands.

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*Computed, as Pepsi-Cola's best estimate, on the basis of 8-oz. equivalent cases.

Diet Drinks Add a New Competitive Dimension

Following the development of new artificial sweeteners leading to the introduction of *No-Cal* in 1952 and *Diet Rite* in 1962, the soft drink industry found itself confronted with a whole new area of competition—dietetic carbonated beverages. These drinks attracted a new group of customers who had previously refrained from drinking sugar-sweetened soft drinks, or limited their intake, and in addition offered competition to the established brands by luring away consumers who were concerned about diet or weight control. By 1965 diet beverages accounted for 12% of total soft drink sales and had reached a level in excess of 15% of total sales when the ban on cyclamates went into effect in October, 1969. By the end of 1970 new formulations using other sweeteners had recaptured 10% of the total soft drink market. American Can Report, p. 30.

The Development of Nonreturnable Containers

Soft drinks packaged in non-returnable containers first appeared on supermarket shelves in 1953, but even as late as 1961 were a minor factor representing less than an estimated 8% of all packaged soft drink containers. However, during the succeeding ten years, as the result of pressures from the can and glass container manufacturers to increase their sales through use of non-returnable packages, a growing inclination by consumers to forego refunds of bottle deposits and throw away returnable bottles, and the unwillingness of supermarkets to handle returnables, the proportion of packaged soft drinks sold in non-returnables increased to 56% in 1971.

CONTAINER PREFERENCE TRENDS

	1955		1960		1965		1970	
	Billion units	Percent	Billion units	Percent	Billion units	Percent	Billion units	Percent
Returnable bottles	19.2	97.5	22.3	94.8	26.8	83.5	20.3	46.5
Nonreturnable bottles	.2	1.0	.4	1.7	1.4	4.4	10.7	24.6
Metal cans	.3	1.5	.8	3.5	3.9	12.1	12.6	28.9
Packaged market	19.7	100.0	23.5	100.0	32.1	100.0	43.6	100.0

Source: American Can report, p. 32.

During this period, supermarket chains put pressure on franchised bottlers to convert to non-returnables through reluctance to handle returnable bottles or redeem them for their deposit.* A 1968 study by Booz, Allen & Hamilton, which included interviews with executives of 27 different chain stores, concluded that the preference among supermarkets for no-return containers was widespread.**

In fact, a major part of soft drink price increases during the 1960's and 1970's is directly attributable to higher costs of using non-returnable rather than returnable bottles. As will be shown, the per ounce price of the drink itself has not increased significantly over the years. (See comparison of current per ounce prices for *Coca-Cola* in 16-oz. bottles with *Coca-Cola* in 6½ oz. bottles in 1902 and 1950 and comparison of *Pepsi* in 16-oz. returnable bottles with the price of private label drinks and new warehouse brands in non-returnable containers at pp. 36–37, *infra.*) Indeed, in the new larger returnable bottles the price per ounce of *Pepsi* and *Coca-Cola* is actually lower than it was years ago (p. 38, *infra*). What has increased in steady proportion is the cost of packaging and distributing those reasonably priced drinks in a wide variety of non-returnable packages. As was pointed out by the former Director of the Office of Environmental Affairs at hearings before a subcommittee of the House Committee on Interstate Commerce:

"The consumer pays more for a beverage in a non-returnable container than in a returnable one. This holds true in some cases even when the deposit is included in the price of the container." Testimony of Roger W. Strelow, 91st Cong., 2d Sess., Sept. 18, 1970 at 18.

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*Hearings on H.R. 14863, etc., to "Prohibit Certain No-Deposit, No-Return Containers", Before a Subcommittee of the House Commission on Interstate and Foreign Commerce, 91st Cong., 2d Sess., Sept. 18, 1970, p. 18.

**Booz, Allen & Hamilton, Inc., A Study of Distribution Practices in the Soft Drink Industry for the National Soft Drink Association (1968).

Non-returnable containers ("N.R. glass"), while somewhat cheaper initially than the heavier, stronger returnable bottles ("Ret. glass"), are used only once before being discarded. Returnable bottles, on the other hand, are constructed to endure repeated reuse. For example, a case of N.R. 16-oz glass is currently priced at $1.10. The bottler can only use this glass one time. By contrast, 16-oz. Ret. glass is priced at $2.32 per case—but the bottler can get many trips from each case of glass. The more trips, the lower the unit glass cost per case.

	Cost per case	Cost per trip
1. 16-oz. nonreturnable glass	$1.10	[1] $1.10
2. 16-oz. returnable glass:		
1 trip	2.32	2.32
5 trips	2.32	.46
10 trips	2.32	.23
15 trips	2.32	.15
20 trips	2.32	.12

Does not include the economic and ecological costs of retrieving and recycling the throwaway nonreturnable container.

Since trippage rates for returns on bottles lower the overall production costs per soft drink unit well below the costs of the same product in N.R. containers, a substantial number of soft drink bottlers still use returnable bottles in preference to throwaways, notwithstanding pressure from supermarkets wishing to handle non-returnables exclusively. This pressure is related to delivery of packaged soft drinks to central warehouses from which the chains can deliver to the network of stores served by the warehouse. But a system of warehouse delivery is totally incompatible with use of returnable bottles. There are no facilities at warehouses for retrieving and storing returnable bottles and refunding deposits, and the chains have no desire to set up any such system.

On the other hand, store-door delivery and pickup of returnable glass by national brand bottlers provide all outlets (chains, large independents, "Mom & Pop" stores) with the least expensive package, with the smallest environmental impact. The returnable bottle is still in most cases the consumer's best choice for value. On an average, the consumer can save approximately $1.00 on each case of 24 bottles on purchases of *Pepsi-Cola* by buying returnable rather than non-returnable bottles.

PEPSI-COLA AVERAGE RETAIL PRICES IN FOOD STORES—BY PACKAGE SIZE/CONTAINER TYPE

	Retail price per bottle		Net difference	
	Returnable bottles	Nonreturnable bottles	Per bottle	Per case
Large (26 oz. and up)	$0.227	$0.329	$0.102	$1.22
16 oz	.128	.169	.041	.98
10 oz	.101	.136	.035	.84

In recent months, as the introduction of large size returnable bottles has shown that national brands can compete with the prices of supermarket private label drinks, with mounting concern over the waste disposal problems created by throwaway packages, and with growing awareness of the costs to the consumer of non-returnable containers, there has been a trend back to the returnable container. Obviously, if this trend continues, a system for handling returnable bottles will be essential. Wanton destruction of the only presently existing means for distributing and collecting returnables would be totally senseless.

Competition from Store-Controlled Labels

The introduction in the 1950's of cans capable of withstanding high acidity and carbonation suitable for canning soft drinks set in motion new systems of producing, distributing and merchandising packaged soft drinks which have led to a whole new area of competition within the industry—economy priced, non-advertised, store-controlled labels of the major food chains. American Can Report, p. 16. While in 1958 only 4 of the top 40 food chains marketed their own

soft drinks, today virtually every food chain and most grocery cooperatives carry their own store-controlled labels.

The share of soft drink food store sales captured by controlled labels jumped from 4.5% in 1962 to 15% in 1967* and in 1970 controlled labels accounted for ⅓ of all soft drinks sold in cans through food stores. American Can Report, p. 39. Indeed, several major chains have now introduced a second controlled label to further their invasion of the soft drink market and supermarkets are beginning to compete with respect to on-premise sales by promoting their own private labels in vending machines, snack bars and service food stands located in their stores.**

Store-controlled labels have soared to success on the coattails of the national brands without having to incur the advertising and promotional expenses borne by owners and bottlers of those brands. Riding on the wave of consumer demand created and sustained by national brand advertising, these labels have been free to sell on the basis of price alone. National brands create product categories, advertise heavily, research the market for new consumer needs, create new products and, as a result, must depend on higher prices per unit to cover the costs of these activities. Store-controlled labels merely imitate national brands after the market for a particular product or flavor becomes large enough to support price competition. Consumers come to the soft drink section of the supermarket attracted by the reputations of the well-known national brands and, once there, noticing the low prices of the store's own labels, which are often conspicuously placed at eye level and allocated proportionately greater shelf space than branded products, often decide on impulse to purchase the controlled label drinks. The result is aggressive price competition which the national brands are endeavoring to meet, without sacrificing their quality and wide distribution in other types of outlets, by offering more product for less money per ounce in large size returnable bottles. (See pp. 36–37, *infra.*)

An unusually candid reaction by one chain to national brand competition to its store-controlled label is illustrated below. Confronted by aggressive merchandising by national brand bottlers this chain instructed its store managers on March 1, 1972 to promote its own label, as follows:

"Floor displays of deposit bottles are becoming more and more prevalent in all of our stores.

As a matter of policy, we cannot allow this. We do not want floor displays of any deposit bottles in any store unless the item is in our ad.

We do need to promote [our label] beverages.

The 28 oz. non-returnable bottle will move out in large quantities, at five for a dollar, *if* this item is properly priced and displayed."

Six weeks later, the same chain reacted to a Pepsi-Cola bottler's special promotion of quart returnable bottles with a memo to 33 stores that because of "heavy advertising", "we find it necessary to stock this [*Pepsi*] item", but instructing the stores:

"We are authorizing displays to earn display allowance on this package. However, it is a must that these are somewhere in the rear of your store so customers will shop this *after* they have passed your regular beverage department. These instructions are per Mr. . . . and *must be followed.*

Fellows, there will be much demand for this item. We must have the product available for our customers. However, every effort must be made to maintain and increase our current volume on [our label] Drinks, both Cans and 28 oz. Bottles."

Shortly thereafter the same 33 stores were advised to discontinue handling 10, 12 and 28 oz. packages of *Pepsi*, *Coca-Cola*, *Royal Crown* and *Canada Dry.* Store managers were instructed that:

"The space obtained from these discontinued items must be converted to 12 and 28 oz. [*our label*] *Drinks.* There will be no exception."

Artificially low prices for store-controlled labels resulting from their free ride on the national brands (see pp. 56–58, *infra,*)* help to explain why studies show that, while most consumers still prefer particular brands of soft drinks, there is

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*Booz, Allen Study, p. 8.

*It should be remembered, moreover, that such price differentials exist only in one segment of the soft drink market—food stores (primarily supermarkets) large enough to have their own labels. In other types of outlets—vending machines, soda fountains and the like—there is no such price differential at any given outlet.

**Soft Drinks, April 1972 at 27.

a growing willingness to try controlled label drinks.** In fact, experts estimate that these private labels "may account for up to 50% of total chain food store volume [of soft drinks] within a few years."***

Competition is also growing by leaps and bounds among cola-favored drinks, which account for approximately 63% of all soft drink sales.**** Nationwide, some 135 different brands of cola drinks were offered for sale during June-July 1970. It requires no more than a glance at the soft drink shelves in chain stores and supermarkets to ascertain that private label colas are a sizable part of the take-home market. *Pepsi* and *Coca-Cola* are locked in vigorous competition, not only with each other and with other national brand colas led by *Royal Crown*, but also with a vast array of controlled label colas and new proprietary or regional brands all seeking to take advantage of the consumer's overwhelming preference for cola drinks.

The same phenomenon of increasing competition can be seen with respect to lemon-lime which is the second most popular flavor category. Following Royal Crown's introduction of *Par-T-Pak*, Pepsi-Cola's introduction of *Teem*, Coca-Cola's introduction of *Sprite* and the introduction of dozens of private label lemon-lime drinks, Seven-Up's 85% share of lemon-lime sales in 1950 has declined to 60% of total lemon-lime sales today.*

Competition from New National Brands

In addition to the increasingly effective competition offered by private label soft drinks, competition has also been sharpened in recent years by the appearance on the scene of new proprietary brands which have grown rapidly and dramatically. Shasta, a division of Consolidated Foods, now markets in 44 states and has increased its case sales (all in N.R. containers) from 27 million (0.8% of the total soft drink market) in 1966 to 68.7 million (1.6% of the market) in 1970. Faygo, operating from a plant in Detroit, has doubled its sales (all in N.R. containers) from 9 million in 1966 to slightly over 17 million in 1970.* Shasta, as well as Faygo, are now listed among the industry's top 100 soft drinks producers.**

While Shasta, Faygo, Frank's, Checkers, etc. have sought to distribute their products primarily through food stores, other new national firms have attacked the franchised bottlers' hold on the soft drink vending market, to the point where *Softdrink* magazine has recently concluded that the bottlers' share of the market "is being challenged as never before."***

Cost Pressures Leading to Increased Soft Drink Prices in the 1960's and 70's

At the same time that competition has been increasing both in vigor and amount in the soft drink industry, pressures on the bottlers as the result of escalating operating and distribution costs have multiplied. Even though the industry has reduced its media expenditures for TV, radio, newspaper, magazine and outdoor advertising over the past 5 years,* these savings have been more than offset by rising labor costs in connection with sales and delivery of its products which have increased approximately 7¢ per 8-oz. case over the same period. Likewise, bottling equipment costs have escalated. For example, in the past ten years fillers and case packers have increased nearly 50% in cost while, during the same period, bottle washers have increased almost 60%.**

In the cities, costs are even higher. Wage rates are higher, labor agreements are more prevalent, land costs are higher, construction costs verge on the prohibitive, taxes of all sorts and insurance costs are greater, and distribution costs are magnified by traffic problems and the small size of downtown stores.

**American Can Report, p. 40; Corplan Associates, *A Study of the Soft Drink Industry, 1965–1970*, pp. 6–7 (hereinafter the "Corplan Report").

***Corplan Report, p. 7.

****American Can Report, p. 31.

*Shih Study at 74; 1971–72 SDI Manual at 20.

*1971–72 SDI Manual, at 16.

**"Top 100 Firms," *Softdrinks*, January 1971, at 30–35.

****Softdrinks*, April 1972, p. 27.

*Media expenditures dropped from $120 million in 1967 to $110 million in 1971. On an 8-oz. case basis, media costs have dropped from $.0445 per case in 1967 to $.0316 per case in 1971.

**Based on 10-oz. package—550 bottles per minute speed.

D. BENEFITS OF THE FRANCHISE SYSTEM

As we have shown, the franchise system, by giving independent Pepsi-Cola bottlers the incentive to invest in and develop their exclusive territories, made it possible for Pepsi-Cola to mount an aggressive attack against the giant of the industry and to become a strong competitor to Coca-Cola, and for other smaller companies to follow suit. But these are not the only benefits which have flowed from thet franchise system now under attack by the Federal Trade Commission. Largely because of Pepsi-Cola's competition, Coca-Cola eventually found it necessary to abandon its one size, small bottle and introduce its product in larger sizes at prices competitive with those of its chief rival, *Pepsi*. The result has been that even today, when inflation is rampant, the consumer can purchase *Pepsi-Cola* and *Coca-Cola* in larger size containers at a price per ounce which is no more than the price per ounce at which *Coca-Cola* sold many years ago. For example, the average retail price per ounce of *Coca-Cola* in 16 oz. returnable bottles is virtually the same today in most markets as was the price per ounce in 6½ oz. returnable bottles in 1902.* This comparison of *Coca-Cola* prices per equivalent 8-oz. case for the years 1950 and 1972 shows:

Year	Package (ounces)	Coca-Cola retail price per case	
		Actual	Equivalent 8-oz.
1950	6.5-oz. returnable	$1.20	$1.48
1972	16-oz. returnable	3.08	1.54

Indeed, still larger bottle sizes (28–64 oz. returnable, resealable bottles) recently introduced by bottlers in some markets have reduced the price per ounce to 6/10 of a cent—even below the price per ounce for *Coca-Cola* in 1902 which was approximately 8/10 of a cent.

Similarly, in most markets* the consumer can purchase *Pepsi-Cola* in 16 oz. returnable bottles at a retail price (per equivalent 8-oz. case) competitive with, and sometimes lower than private label drinks in non-returnable containers and below the price of the new warehouse-distributed drinks such as Shasta.

RETAIL PRICE PER 8-OZ. EQUIVALENT CASE—PEPSI-COLA 16-OZ. RETURNABLE VERSUS PRIVATE LABEL AND SHASTA

Area	Pepsi 16-oz. returnable	Private label			Shasta cans
		Bottles (nonreturnable)	Cans	Weighted average	
Total United States [1]	$1.54	$1.37	$1.62	$1.50	$1.81
Metro Chicago	1.60	1.76	1.73	1.73	2.10
Kansas City	1.57	1.23	1.59	1.51	1.87
Denver	1.53	1.14	1.58	1.45	1.81
Seattle/Tacoma	1.90	1.43	1.61	1.54	1.88
Atlanta	1.43	1.39	1.53	1.45	1.72
Dallas/Forth Worth	1.44	1.18	1.69	1.47	1.92
Nashville	1.53	1.46	1.63	1.52	1.71
Cleveland	1.65	1.49	1.75	1.60	1.71
Minneapolis/St. Paul	1.61	1.54	1.42	1.44	1.75
Baltimore/Washington	1.76	1.42	1.70	1.61	1.85

[1] Food stores representing 42 percent of total soft drink sales.

Furthermore, the consumer has benefited, not only from prices which have been kept down by vigorous interbrand competition, but from a system of distribution dependent on exclusive territories, which has made soft drinks readily available almost everywhere in a wide variety of outlets. The territorial fran-

*Affidavit of J. Lucian Smith, President of Coca-Cola U.S.A., dated February 11, 1971, in *The Coca-Cola Bottling Co. of Taft, Inc.* v. *The Coca-Cola Co.* (Div. No. 71–270—Cal.), pp. 9–10.

**Pepsi* in 16 oz. returnable bottles is available in chain stores doing over 60% of chain store volume for all communities.

chise system developed at a time when the returnable bottle was the only container available. The geographic limits of early franchises reflect the economies of distributing and retrieving returnable bottles. No bottler would have been willing to make a sizable investment in returnable glass bottles without some assurance that his bottles would be returned to his plant and not lost at distant locations or returned to other bottlers. As a result, bottlers developed their territories intensively, as they were required to do by their franchise agreements. Instead of merely concentrating on the most profitable accounts, they strove to make the soft drink brands for which they held franchises available in every conceivable type of outlet—in small convenience stores, places of amusement, drug stores, gasoline stations, ball parks, "Ma and Pa" grocery stores, fast-food outlets, restaurants, hotels, motels, as well as in supermarkets and large volume outlets.

The territorial protection provided by the franchise system has given bottlers economic incentives to continue to develop a variety of channels of availability for their products. The consumer benefits from the convenience of having the soft drink of his choice easily available where he wants it and when he wants it. He can go to a supermarket to buy soft drinks. If it is more important to him to buy soft drinks at a small store conveniently located nearby, or where he has a charge account, or which delivers to his home, or where soft drinks are available cold for on-premise consumption, or in conjunction with a trip to a gas station, the consumer has that choice as well.

Territorial franchises also afford the basis of a workable system of quality control which acts as a consumer protection particularly important for products like soft drinks which are bought and consumed by people of all ages. Nationally advertised beverages depend for their continued public acceptance on widespread availability and uniform standards of high quality. The brand's reputation, and ultimately the financial success of the owner of the brand, is thus in the hands of the franchised bottlers who actually manufacture and sell the drinks. Pepsi-Cola sets quality control standards for each of the soft drinks sold under its trademarks, sets purchasing specifications for raw materials, supplies technical assistance to bottlers and inspects the plants where its products are bottled. It engages in constant monitoring of concentrate formulation and labeling requirements to assure compliance with government regulations. From 1967 through 1971 Pepsi-Cola has spent the following amounts to insure the consistent quality of products sold under its trademarks:

1967	$1, 175, 000
1968	1, 120, 000
1969	1, 000, 000
1970	1, 141, 000
1971	1, 515, 000

and plans to spend an additional $1,831,000 for that purpose in 1972.

Yet, notwithstanding these expenditures, high quality depends in the last instance on the bottler and, unless the bottler responsible for a below-standard or defective product can be readily identified, quality standards cannot be enforced. When there is only a single authorized source of a trademarked product within a particular territory, monitoring the quality of that product is greatly simplified. But, if the product could have come from any one of a number of sources, perhaps hundreds of miles away or in another state, how can a consumer with a complaint tell who bottled a particular soft drink after the cap has been removed and discarded? And how can the trademark owner know which of the bottlers of its products may be responsible for failure to comply with quality standards? Exclusive territories assure that the consumer will know to whom to complain about an unsatisfactory product and that the trademark owner will know to whom it should look for maintenance of the quality standards essential both to protection of its trademark rights and the reputation of products bearing that mark.

Territorial limits also simpify inventory and quality control for the bottler. If a product recall is necessary the local franchisee can react quickly, and specifically, thus limiting the magnitude of the problem. If distribution is national in scope, a product problem could not be localized and the product recalled would need to be total.

Just as the franchise system underlies a workable system of quality control, so too it makes posible franchisor assistance to small bottlers when they are in financial trouble or require financing, or when they need technical asistance to

expand their businesses or marketing assistance to meet competition. For example, in 1971 Pepsi-Cola assisted its bottlers with loans and repurchase agreements totalling between $15 million and $20 million and had outstanding guarantees of loans to bottlers amounting to between $500,000 and $1 million. Without the franchise system, assistance to a small bottler who needs to stay in business and become economically viable would be a practical impossibility. If the small bottler can be forced out of business at any time by a larger, better-financed neighborhood bottler selling the same trademarked product into his territory, the franchisor could not offer financial assistance with any asurance that loans would ever be repaid or give technical or marketing aid with any expectation that it would lead to increased sales of his products by the bottler receiving the aid.

Another virtue of the franchise system is its flexiblity and adaptability to orderly change. An example is the development of the larger size returnable bottles to meet price competition from private labels. Still aonther is increasing "price-off" activity by national brands in recent years, both in order to compete more effectively among themselves and to compete with low-priced private labels. For example, using 1969 as a base, the percent of sales using "price-off" promotions has doubled for most major national brands.

GROWTH OF PRICE-OFF ACTIVITY FOR SELECTED NATIONAL BRANDS, JUNE/JULY 1969, 1970, 1971

[Base June–July 1969=100]

	Pepsi-Cola	Coca-Cola	7-Up	Royal Crown
1969	100	100	100	100
1970	154	129	100	88
1971	200	193	280	138

The high degree of price elasticity prevailing in the freedom of choice market for soft drinks (where consumers are free to choose among a wide variety of competing brands and labels) is demonstrated by the following analysis of the impact of price-off promotions for *Pepsi-Cola* in selected areas.

EFFECT OF SOFT DRINK PRICE ELASTICITY IN FREEDOM OF CHOICE MARKET

Selected markets	Package promoted	Normal retail	Promotion retail	Incremental increase in total case sales [1]	
				Cases	Percent
St. Louis	12-oz. returnable	6 for $0.75	6 for $0.51	15,667	[2] 140
Dallas	10-oz. returnable	8 for $0.69	8 for $0.39	2,730	[2] 200
Phoenix	32-oz. nonreturnable	3 for $1.00	3 for $0.89	936	[2] 48
Chicago	16-oz. returnable	8 for $1.09	8 for $0.95	182,000	[3] 38

[1] Sales above "normal" expected level without price-off promotion effort based on trend.
[2] Aug. 23 to Sept. 4, 1971.
[3] Year—1971.

The franchise system has likewise demonstrated its capacity for orderly change through the consolidations of small franchises which have been voluntarily taking place over the last ten years in the interests of achieving greater efficiency and production economies. Capital requirements in the soft drink business have become increasingly heavy (see p. 35, *supra* and p. 49, *infra*). With expansion comes more complex management requirements: sophisticated techniques must be learned and applied.

All of these factors add up to great economic and management pressures on small bottlers to sell out to larger, more sophisticated public companies having access to larger capital resources and managerial skills. The present franchise system, while leaving room for voluntary consolidations to achieve efficiency, retards acquisitions of unwilling smaller bottlers who are still struggling to develop their franchises.

Over the years, Pepsi-Cola Company has made both acquisitions and sales of franchised bottling operations which are best characterized as rescue operations consistent with Pepsi-Cola's support for the franchise system. Although Pepsi-Cola has made some acquisitions which have resulted in the combination of an unsuccessful small territory with a larger nearby territory to create a more viable marketing unit, there has been no apparent effort on Pepsi-Cola's part to force consolidations or mergers of its independent bottlers or to acquire their businesses for itself.

Apart from the Company-owned operations which date back to the foundation of the Pepsi-Cola franchise system and which have served over the years as flagships of the bottler fleet, on occasion, Pepsi-Cola has purchased one of its franchised bottlers that was in poor economic health due to lack of adequate managerial or financial resources. This has enabled Pepsi-Cola to rebuild and revitalize dormant markets for its products. In the majority of instances these were resold, after rehabilitation at Pepsi-Cola's expense, to independent local businessmen. In some instances, these new purchasers also proved unable to operate the franchise profitably and Pepsi-Cola has had to reacquire the business previously sold. Once more Pepsi-Cola has stepped in, reinvested, rehabilitated and resold. The turnover of distressed franchises has generally been rapid and Pepsi-Cola's manufacture and distribution of soft drinks in these areas usually short-lived until a new independent bottler was appointed.

The substantial financial losses which the Company suffers in these "rescue operations" are necessary both to protect the Company's trademarks from abandonment in particular markets and to encourage the further growth of the franchise system which has been the bulwark of Pepsi-Cola's success in the soft drink industry. Pepsi-Cola has not expanded the role of its company-owned operations at the expense of its independent bottlers. Indeed, study of the 1961–1971 period shows that the number of its aquisitions and sales of bottling operations are in substantial balance and that the ratio of Company-owned franchise product volume to total *Pepsi-Cola* volume actually declined.

In summary, the franchise system provides the individual entrepreneur with the opportunity to build his own, local, community-oriented business through the combination of his capital, enterprise and willingness to work with the existing strengths of an established, nationally recognized, consumer accepted trademark product. Under the franchise system the local owner becomes the immediate beneficiary of the reputation and consumer trust of the franchised trademark, and shares in the many services provided by the franchisor which bottlers could not hope to afford from their own resources. Franchising in the soft drink industry has been a uniquely efficient and beneficial way of supplying quality products nationwide through the efforts of hundreds of independent, local and successful businesses.

III. The Fallacies of the FTC Position

A. If the FTC succeeds in abrogating territorial franchises, the economics of expansion and the locations of central warehouses would place the large public bottler and conglomerates in an insurmountable position to capture the chain store business

The FTC staff's conception regarding the alleged growth of small bottlers in the absence of their protective franchises can most charitably be attributed to a combination of business naivete and little knowledge of the costs of expansion in this capital intensive industry. Furthermore, it stems from a fundamental misconception of which bottlers will capture the chain store business if there is an increased use of central warehousing upon the abrogation of territorial franchises.

In the first place, the considered judgment of the businessman, himself, who must operate in the market on a daily basis, must be given the weight it deserves as against the theoretical assertions of the FTC staff. Despite the staff's claims of domination by large bottling companies, the fact still remains that the small bottlers, who originally built the Pepsi-Cola business, are still the backbone of the Company's success. While some 50 companies hold more than one Pepsi-Cola franchise, six-times that number hold only a single franchise. The latter group consists of bottlers having the following volumes:

TOTAL UNITED STATES.—SINGLE FRANCHISEES 1971 DISTRIBUTION OF FRANCHISE SALES—ALL PRODUCTS TOTAL SALES, 8-OZ. CASES

Franchise sales	Number of franchises	Percent of single franchises	Percent of volume
5,000,000 and over	6	2.0	16.9
2,000,000 to 5,000,000	30	10.0	27.8
1,000,000 to 2,000,000	58	19.3	26.9
500,000 to 1,000,000	69	22.9	16.3
200,000 to 500,000	87	28.9	9.9
100,000 to 200,000	35	11.6	1.8
Under 100,000	16	5.3	.4
Total, United States	301	100.0	100.0

Thus, of the 301 single-franchise bottlers, 207 of them have annual volumes of less than one million cases while 94 sell more than a million cases per year.

The Pepsi-Cola Bottlers Association, a trade association comprising all but one of the Pepsi-Cola bottlers, has intervened in opposition to the FTC proceeding. There is no discernible support for the FTC approach among any Pepsi-Cola bottlers and no indication whatsoever that small bottlers agree with the FTC staff that elimination of territorial franchises will speed their growth. On the contrary, the overwhelming majority of bottlers, consisting of several thousand small bottlers, have directed their associations, the National Soft Drink Association, and the respective Coca-Cola and Pepsi-Cola bottler organizations, and have contributed funds, to fight the FTC action. Individually and collectively they have turned to Congress to protect them against the FTC attack. In short, the judgment of the marketplace—the judgment of the businessmen directly involved—is that the FTC position will destroy, not help, small bottlers.

The Bottling Business Is Capital Intensive

Moreover, the economics of expansion is weighted heavily against those companies which do not have ready access to sizable investment capital. Expansion requires space for plant and warehouse, machinery and equipment to produce and convey bottled beverages, vehicles for delivery, and working capital not only for ingredient and packaging components but to cover wages and other expenses.

That the bottling business is capital intensive is clearly illustrated by the following table. It compares the capital investments required to start up a plant with a one million case (8-oz.) volume as against a two million case volume plant (representing respective revenues of $1,500,000 and $3,000,000).

1972 FIXED ASSET INVESTMENT REQUIREMENT

	1,000,000 8 oz. cases	2,000,000 8 oz. cases	Incremental change
Land at $20,000 per acre	$100,000	$150,000	$50,000
Building at $16 per square foot	448	672	224
Route trucks at $12,000 per truck (15 trucks per million cases)	180	360	180
Bottling line—28 and 40 valve	475	681	206
Glass and shell (returnable) at $3.41 per case	512	1,023	511
Glass and shell (nonreturnable) at $1 per case	(110)	(220)	(110)
Working capital at $0.10 per case	100	200	100
Total (returnable)	1,815,000	3,086,000	1,271,000
Total per case (returnable)	1.82	1.54	1.27
Total (nonreturnable)	1,413,000	2,283,000	870
Total per case (nonreturnable)	1.41	1.14	.87

The above table depicts the start-up costs of a new plant. It does not as such reflect the costs to an existing bottler with a one million case capacity of an expansion to two million cases. The investment for such an expansion is, however, at least roughly equivalent to, and in most cases would be much greater than, the incremental change reflected in the table. An expansion of this magnitude would

require additional investments in glass, working capital and building (plant expansion) identical to those reflected in the table.

Of course the bottler wishing to expand might be able to avoid some of the incremental costs listed in the table. For example, he might be able to operate some period of time without the purchase of land and could thus avoid, at least temporarily, the $50,000 investment. Similarly, the bottler might make do by adding not the fifteen route trucks listed in the table but two or three tractor-trailers at $20,000 per truck. On the other hand, it would be virtually impossible for most bottlers to double their capacity without acquiring a new, 40-spout bottling line.* As indicated in the table, the cost of such a line is currently $681,-000. The bottler could offset against this cost only the amounts received for his old bottling line which would be a fraction of its original cost of $475,000. Thus the investment cost to the bottler for a new line would be much greater than the $206,000 incremental change listed in the table.

For a small bottler, the investment costs of a significant expansion in volume can be conservatively estimated as at least one-half, if not much more, of each dollar of annual expanded sales. Even this estimate does not include additional labor costs caused by the addition of employees and increasing union pressures. Investments of this magnitude are of too large a dimension to be easily available to small bottlers, particularly to the many bottlers whose annual volumes are even less than the million cases presupposed in the table. Territorial franchises have actually encouraged such investments in the past by offering a prospect of a long range return, but a small bottler's ability to finance such investment in the absence of territorial security is much more problematical. Such investments are simply beyond the financial condition of the average small bottler and, in the absence of territorial protection, he would encounter extreme difficulty in obtaining additional financing for such vulnerable investments which face extinction at the hands of larger and financially stronger bottlers. As a result, it is mainly the publicly owned bottlers, having the financial capacity to withstand any competitive challenge and lower incremental costs, who will have the incentive and ability to commit such funds as they expand into the territories of their weaker neighbors.

Central Warehouses Are Closest to Large Bottlers

There are physical as well as financial reasons militating against small bottlers expanding into central warehouse distribution. Significantly, the large bottlers are nearer the chain warehouses. Indeed, the warehouse locations of the largest 42 chains (which control over 90% of total chain volume), and the warehouses of the largest 22 voluntary and cooperative groups, are located within the boundaries of only 119 of the approximately 500 Pepsi-Cola franchise areas. These 119 include 66 which rank in volume among Pepsi-Cola's 100 largest franchises, and an additional 12 which are individual units of multi-franchise bottlers none of which has group sales less than five million cases (8-oz.) of Pepsi-Cola products. Included also are 21 franchises which sell over one million cases of Pepsi-Cola products. The remaining 20 smaller franchises are mostly located in the northern plains and Rocky Mountain states where population density is low. Moreover, the first 78 franchises mentioned above (the 66 of the largest 100, plus the 12 multi-franchise units) cover 201 of the 268 largest chain and voluntary and cooperative group warehouses, and those 201 warehouses service 87% of all the stores of the 42 chains and 22 voluntary and cooperative groups.

The big bottler cannot be expected to allow a distant rival to capture sizable business in his backyard. While the suburban or rural bottler may have cost advantages when he stays in his own locale, as soon as he ventures to deliver into the center city he will face some of the same cost problems as affect the urban bottler, such, for example, as labor agreements. Nor, even were it to mean a temporary price adjustment, is the big bottler going to permit this invasion. For the big-city bottler knows that once it captures the chain store business it has dealt a fatal blow to its suburban rival. It would be the opening step in the elimination of the suburban bottler. Once that is accomplished, and the big bottler has expanded into the suburban area, it can raise prices in this new

*It would be impossible to reach this significant an expansion by putting on a second shift because of problems with larger-size bottles and the seasonal nature of the demand for soft drinks.

market back to its old downtown prices with consequent improved profit margins.*

Thus, it is wishful thinking that the smaller bottlers will have either the means or the opportunities to expand and successfully invade the preserves of their more powerful neighbors. Quite the contrary, once small bottlers lose their territorial protection they will be vulnerable to the loss of their business. Nothing in this prospect of the takeover of their territories by large bottlers suggests any lasting price reductions to consumers.

B. THE ASSERTION THAT CENTRAL WAREHOUSING MAY OFFER GENERAL COST SAVINGS, OR THAT CONSUMERS WILL BENEFIT THEREFROM, IS ILLUSORY

Store-door delivery has made branded soft drinks available in more retail locations than any other consumer product category, with the possible exception of cigarettes, gum and candy, all lighter and less bulky items than soft drinks. At the outset, then, it must be kept in mind that central warehousing is not even a factor to be considered in distribution to most of the soft drink market Basically it is the food chains which have cohesive warehouse systems that could be expanded to handle national brand soft drinks, and they account for only an estimated* 22% of the soft drink volume.

Soft drink industry sales (8-oz. cases)

Market category:	Percent
I. Food stores	42
A. Chains	22
B. Large independents	8
Subtotal	30
C. Medium independents	7
D. Small independents	5
II. All other outlets	58
Total	100

Furthermore, chains are not sitting with idle warehouse space and trucks ready to accommodate the onslaught of branded soft drinks which heretofore have been store-door delivered without any vehicle or warehouse investment by the chains. The costs of conversion by chains to warehouse distribution would itself be huge, estimated to be some $60 million, of which $17 million would cover the required additional warehouse space and $43 million the needed truck capacity. In order not to balloon these investment costs the axe inevitably must be applied to the slower moving brands, which inevitably will lose out in finding their way to supermarket shelves, with a consequent reduction in interbrand competition.

Even Assuming That Central Warehousing Could Yield Some Cost Saving, Nothing Suggests It Would Be Passed On To The Consumer

Before demonstrating that central warehouse distribution does not yield general cost savings, as a preliminary matter it should also be noted that, even if the contrary were true, there is no basis for assuming that such savings would be passed on to the consumer. In fact, current evidence points the other way. For example, the most economical package to the consumer is the returnable bottle; yet, chains by and large do not want them. Many chains have indicated concern about the growing trend of national brands in large returnable bottles which, being directly competitive in price per ounce wtih chain private labels, reduces demand for them. In other words, as a matter of convenience chains

*Similarly, the suburban or rural bottler would find any local cost advantages likewise of little avail were he to attempt to reach the city market in pursuit of accounts other than central warehouses. Generally, route delivery beyond a one-hour driving radius from the plant. 40 to 50 miles, becomes uneconomic because of truck operating costs and, even more important, the reduced selling time. At one hour from the plant, selling time available is reduced to only a little over half the total eight hour day. Time for driving to and from the route, plus driving between stops, and plant check-out and check-in, consume almost four hours. Each mile added to the radius reduces selling time an additional 2.67 minutes (at 45 mph). Assuming the rural bottler could enter the city without encountering union or other problems, it becomes obvious that even though his cost advantage might tempt him to extend his economic radius somewhat, diminishing returns resulting from the compounding penalties of increased operating costs and reduced selling time preclude significant extension.

*Pepsi-Cola Marketing Research Estimates (based on *Nielsen* and other sources).

do not encourage the returnable bottle by which savings could be passed on to the consumer, nor as a matter of economics will they pass on savings which allow national brands to compete more effectively wtih store-controlled labels. The chains, after all, control their retail prices for both their labels and national brands and can adjust the differential to suit their purposes. A number of them, for exampie, apply a specific markup to the national brand drink for which they pay the highest wholesale purchase price and then charge other national brands at the same level thus denying the consumer any savings on whatever lower wholesale prices exist for these other national brands. This practice, likewise, favors the chains' controlled labels.

Indeed, the pricing by chains of their labels can never be any guide to what retail prices of national brands should or could be. The marketing philosophy regarding store-controlled labels is that they must sell at lower prices than national brands or they will not sell at all. For one thing, they can do so because of certain intrinsic cost savings. For example, the somewhat lower quality of their ingredients, including sugar and flavoring, and of their packaging, are reflected in substantial cost savings for private labels. Also, controlled labels obtain a "free ride" on the advertising and promotional activity of the national brands which has led to a doubling of industry sales of soft drinks within the past ten years.* This stimulation of sales of all soft drinks aids the private labels, but they bear none of the promotional expense, and thereby enjoy another cost saving as against the national brands. Further, in pricing their controlled labels, the chains do not take into account certain hidden costs which are recovered by the chains in their overall operations. Thus, the prices of store-controlled labels do not reflect items such as warehouse handling, freight expenses from warehouse to store and in-store handling and shelving. Were these costs included by chains in setting their own label retail prices they would likewise reduce the price differential between national brands and controlled labels.

These several cost factors favoring controlled labels—cheaper ingredients and packaging, no advertising and promotional expense, and the failure to take into account hidden costs—represent more than half of the spread between the wholesale prices of national brands and those of controlled labels. As for the balance of the wholesale price differential, it is reflected in the other costs and profit margins required to keep bottlers as viable entities and permit them to maintain store-door delivery throughout a vast retail network (See III.C, *infra*). In addition, because national brands research the market for new consumer needs and create new products, they must depend on higher prices per unit than controlled labels that merely jump on the bandwagon when the market becomes large enough to support their price competition.

Nor will chains be inclined to reduce prices and thereby diminish the relative profit potential of national brands as compared to their controlled labels. Despite the price advantage of their own labels, their share of claim sales in relation to the shelf space afforded them does not approach that of the national brands. While given more in-store visibility and end-aisle display space, store-controlled labels lag substantially behind national brands in their ratio of space to sales:

ANALYSIS OF SHARE OF SPACE TO SALES IN CHAINS

[In percent]

	Share of space	Share of sales	Ratio share of space to sales
National brands:			
Pepsi-Cola	11.2	17.2	65
Coca-Cola	11.7	19.6	60
7-Up	5.9	8.6	69
Warehouse brands:			
Controlled labels	23.4	18.6	126
Shasta	4.5	3.1	145

In Pepsi-Cola's recent study of the A & P operation in Michigan, the ratio of gross profit per share of space realized by this chain was determined to be $3.20 for *Pepsi-Cola* against $.69 for controlled labels and $2.22 for Faygo.

*See p. 22, *supra*.

Realistically, therefore, it is highly unlikely that the national brands would be given additional price or space advantage at the supermarkets if they were distributed through chain warehouses since this would weaken demand for the chains' own labels. Thus, doubtful as is the assumption that central warehouse distribution would yield overall ultimate economies, if there are any it is much more probable that they would serve to increase chain profit margins than to lower prices to consumers.

In Any Event, Central Warehousing Would Not Yield Cost Savings

Speculation on consumer benefits vanishes entirely when it is seen that there really can be no savings even if chains invested in the additional space, vehicles and personnel to replace store-door delivery. On the contrary, the results of the two cost studies made by Pepsi-Cola in recent years to compare the chain warehouse system with store-door delivery show the letter to be only marginally more expensive than warehouse distribution. As is shown below, this differential is more than consumed by increased packaging cost since the warehouse system depends upon non-returnable packaging whereas store-door delivery permits availability of the more economic returnable bottle.

The nature of the two studies, the first made for Pepsi-Cola by Cresap, McCormick & Paget in 1965, and the other, Pepsi-Cola's own study of the Grand Union operation in 1968, are described in more detail in Appendix A. Therein also, the methodology by which these reports have been updated in an effort to reflect current costs is described. Both these studies, either by relying on time and motion study techniques for measuring costs or upon existing studies thereof, were aimed at calculating costs for personnel and equipment in relation to the time required to service the delivery of the products in each of the two distribution systems.

From these studies, the relative cost of distributing soft drinks in non-returnable containers on a store-door basis can be put at 33c per case as against 20c per case under the warehouse method. Thus, the overall cost differential between these two methods of distributing non-returnables is small, being only 13c per case, or less than a cent per bottle. On the same basis, store-door delivery of soft drinks in returnable containers, as would be expected in light of the added expense of bottle retrieval, is 60c per case as against 40c for the warehouse method. But this 20c saving is illusory because the warehouse system could not deal with returnable bottles. The cost of non-returnables is about 75c higher than returnables per average size case (non-returnables at $1.00 per case less estimated attrition of returnables at 25c per case). Even when the store-door delivery cost of returnables (60c) is compared to warehouse distribution costs of non-returnables (20c), it is plain that the added cost of non-returnable containers is almost double the warehouse distribution savings.

Yet this is only a part of it. Once there is a switch from store-door delivery to central warehousing, it must be expected that franchise bottlers will convert entirely to non-returnables both for the chains and for the rest of their volume. The first conversion, measured only by the returnable glass now flowing through the chains, would add $200,000,000 annually in costs to be borne by the consumer.

But, it would not end there; rather, a total conversion to non-returnables in sales at all outlets would be precipitated. At present, returnables constitute 60% of the packaged volume of franchise bottlers. Their investment in a returnable glass float is considerable. For example, if a bottler has returnable sales of one million cases per year, he would need at least 200,000 cases of glass to maintain that volume, which would require an investment of over $400,000. To justify this investment, he must have reasonable assurance that he will be able to recover the bottles and reuse them a number of times. Under existing territorial franchises, the bottler can afford this investment because his route salesmen are responsible for collecting returnables in the stores they service. But under central warehousing, the bottler will lose complete control of the recovery of empty returnables because the bottles would be dispersed over a broad geographic area where they are readily susceptible of falling into the hands of other bottlers who did not make the initial investment. Further, chains show no interest in handling returnables through their warehouses and in taking responsibility for their return, nor in finding warehouse space sufficient to store returnables received from their widely scattered supermarkets. Finally, if deposits to consumers were raised to the value of the bottle, so as to neutralize the risk of loss, the price (including deposit) would rise so high to consumers that they would be discouraged from purchasing returnables. The shopper would

then bear the full risk of loss or breakage, the economic incentive to buy returnables would be subverted, and they would again not survive as a feasible package.

Thus, a switch to central warehouse distribution has within it the seeds not only of replacing store-door delivery but of eliminating the returnable bottle. The annual cost to the consumer of conversion to non-returnables is estimated at about one billion dollars (at $1.00 per case retail). This massive annual volume of disposable glass would add about 15 million tons to the national ecological problem, at a cost currently estimated to range between $16 and $19 per ton. To the bottler it would be a further financial blow—the obsolescence of his returnable bottle inventory and higher packaging costs.

Rather than holding out any real prospect of consumer savings, central warehouse distribution actually preserves the imposition of an enormous new cost burden upon the public. It means the loss to the consumer of an existing option to purchase in returnable bottles which are now affording costs savings to many shoppers. Finally, although central warehousing is not a distribution method available in over 75% of the soft drink market, as shown below a switch to central warehousing by the chains will inevitably lead as well to higher prices in the non-chain outlets.

C. IN THE MAJOR PORTION OF THE SOFT DRINK MARKET, TO WHICH CENTRAL WAREHOUSE DISTRIBUTION DOES NOT EVEN APPLY, THERE IS LIKEWISE NO ECONOMIC ALTERNATIVE TO STORE-DOOR DELIVERY BY THE BOTTLER

It has been observed that, except possibly for cigarettes, gum and candy, no product category is available in more retail locations than are national brand soft drinks. This fact is even more impressive when consideration is given to the weight and bulk of soft drinks. It is one thing to develop an economic distribution system for cigarettes where the gross income per pound is $4.00–$5.00 and for hard-roll candy and gum where the gross income per pound is 90¢–$1.00, and quite another where a pound of delivered returnable soft drinks produces at wholesale a gross income of 3.5¢–4.5¢. The equipment, vehicles and personnel needed to handle heavy and bulky cases of soft drinks is a major stumbling block to any economic restructuring of the distribution system.

If the chains turn to central warehouse distribution, the stage is set for the crumbling of the store-door delivery system. Those many bottlers, particularly the smaller ones, which do not capture the warehouse business will lose the patronage of the chain supermarkets in the areas they serve. These high volume accounts are the balancing factor which sustain the less economic store-door delivery to the myriad of low volume accounts. Once the profitable high volume business is severed, the remainder, more than 75% of a bottler's sales, is no longer economical at current price levels.

Wholesale Grocers Are Not an Economic Alternative

What then are the alternatives to higher prices at these low volume outlets, or a shrinkage in the availability of soft drinks because it is no longer economic to serve many of them? First, the bottler will consider whether he can shed his store-door delivery system, thereby cutting his costs, and sell these accounts through some other existing channel of distribution which can economically handle his soft drink products. To a very limited extent, wholesale grocers might be found to serve some of the food store business. They exist to supply products of the many manufacturers of grocery products to the independent grocery trade, performing in a sense the same service as the chain warehouse but for a fee or percentage. Many already handle a small volume of soft drinks, all fully boxed in non-returnable containers, generally of minor brands and local labels and, in some cases, Shasta or Faygo. These and others would have to be willing to expand their warehouse and trucking facilities to carry quicker selling, and therefore much more voluminous, national brands of soft drinks.

But, once grocery wholesalers start warehousing soft drinks in such volume, their position becomes indistinguishable from the central warehouses of the food chains. All the reasons heretofore stated why the large bottlers would capture the central warehouse business apply as well to the wholesale grocer who expands his warehouse to distribute branded soft drinks to his many food store accounts. Similarly, and for the same reasons as the chains, these wholesalers will not handle returnables through their warehouses. Thus, the same cost factors involving non-returnables which would increase costs to the chain supermarkets will likewise increase costs in the independent grocery stores with resultant

higher soft drink prices there as well. A further upward pressure on prices would be introduced by the imposition into the chain of distribution of a new middleman, the wholesale grocer, and the margin of profit he will require. In addition, there would be a reduction in interbrand competition as wholesale grocers refuse to stock secondary brands, products such as Shasta and Faygo and local labels which have too low a turnover rate to justify costly investments in the storage space and delivery equipment necessary to handle such products through the warehouse system. Thus, entry of wholesale grocers into distribution of branded soft drinks is unlikely to be even a partial solution for the small bottler and, in any event, will only lead to higher prices to consumers.

Milk or Beer Distributors Are Not an Economic Alternative

Furthermore, even the wholesale grocer has no connection with some 25% of the bottlers' business represented by such outlets as gasoline stations, candy and drug stores and vending. Milk and beer are distributed to convenience stores and some of these other outlets, but those distribution channels afford no solution. The existing delivery equipment for milk, a refrigerated product, is unsuited for soft drinks; indeed, milk delivery is regulated and in some states, New York, for example, where the transportation of carbonated soft drinks on trucks carrying dairy products is specifically prohibited. Beer in most states can be sold only in specific outlets licensed to handle the product and is not sold through vending outlets anywhere. In summary, the combination of licensing and regulatory constraints, the failure of either system to cover all needed outlets and the inadequacy of the vehicles used, preclude the substitution of either the beer or milk distribution system for the existing soft drink store-door system.

Candy, Gum and Cigarette Jobbers Are Not an Economic Alternative

There remains then only the ubiquitous candy, gum and cigarette jobber who does have regular distribution to the array of miscellaneous accounts at which soft drinks are typically sold. While this is the most logical channel to which to turn, the difference in the size and weight of soft drings and their relative low per-pound profitability as compared to candy and cigarettes means that the existing physical equipment and personnel of these jobbers are not suited and that this method of distribution is not presently geared to handle soft drinks.

There are an estimated 600,000 retail locations carrying candy and gum, which sell under a wide assortment of brands. In addition, these products are vended in machines controlled by some 5,000 operators. However, some 40,000 of these retail outlets (food chains, drug and variety stores and larger independent retailers) and the vending machine operators are sold directly by the candy and gum manufacturers from their plants or strategically located warehouses. The balance are sold and serviced from some 20,000 candy jobbers of which approximately 2,500 also handle tobacco products. Shipments are made to the candy jobber warehouse direct from plants or manufacturers' warehouses. Nevertheless, the major candy and gum manufacturers maintain field sales forces of from 200 to 600 salesmen which, among other things, look to store inventories and take orders. About 60% of candy and gum sales are represented by the jobber accounts. Each jobber may handle several hundred brands since they are not placed on an exclusive basis. Jobbers, however, are sold by manufacturers at the same price as direct buying retailers.

With relatively few exceptions all retail locations selling candy and gum sell cigarettes. However, cigarettes are sold in many additional outlets not handling candy and gum such as gasoline stations, eating and drinking establishments and liquor stores. Cigarette vending machines are far more numerous than candy machines. The distribution of cigarettes is similar to that of candy and gum. That is, chains, vending operators and large independent retail operators are sold and shipped on a direct basis by manufacturers while a large number of smaller outlets for cigarettes are served by tobacco jobbers. Tobacco jobbers account for about 25% of the business. Again, major cigarette companies maintain a force estimated between 600 and 1,500 salesmen who perform essentially the same selling and merchandising tasks as do the candy and gum field forces. As is the case with candy and gum, cigarette manufacturers' prices are the same to all elements of the trade and for all quantities.

With respect to these systems, there are a number of salient factors. Jobbers need a ten or twenty per cent margin to break even. Despite their prevalence, a large number of manufacturers' salesmen are also required to cover the market. The number of outlets to be serviced—over 600,000—is enormous. Finally, prices among the several manufacturers appear to be uniform.

As noted previously, on a per pound basis, cigarettes yield gross income one hundred times greater than returnable soft drinks, and gum and hard-roll candy some twenty-five times more. Thus, the candy and tobacco jobbers, and their economics, are geared to the delivery of small, lightweight products and their vehicles and storage capacity are so scaled. Likewise, delivery personnel are not required to handle cartons having the weight of a case of soft drinks. Thus, this channel of distribution is not physically equipped for delivering the much heavier and bulkier soft drink products. To gear up to such distribution would require an investment in trucks alone in the neighborhood of $500 million to $1 billion.

The particularly ingenuous view of the FTC staff that somehow or other wholesale operations will materialize that can take advantage of central warehousing to serve the small-volume retail accounts is perhaps epitomized in their ideas about vending (FTC Staff Position Paper, p. 27) For example, they assert that the hypothesized increased competition among bottlers brought on by the elimination of territorial franchises will lead to lower prices in vending machines. What they fail to realize is that vending prices are typically in 5¢ increments. To reduce the price of the single drink by 5¢ would amount to $1.20 per full case (24 bottles x 5¢). For a retailer to maintain the same margin of profit, he would therefore need a reduction of $1.20 per case from the bottler. But the typical case of branded soft drinks for vending sells at wholesale on average at $2.65 (10-oz. N.R.) or $3.00 (12-oz. can) per case. How a bottler is supposed to cover his costs and a reasonable return on investment in the face of a 40–45% cut in his price is never explained by the FTC.

In summary, the only known system capable of distributing branded soft drinks on an economical basis is store-door delivery by franchised bottlers. A shift from it would involve heavy capital investments, high operating costs, the discontinuance of the returnable bottle, fewer retail outlets selling soft drinks, more out-of-stocks, and higher average retail pricing. If the advent of central warehouse distribution cripples bottlers deprived of chain store sales to the point where they cannot continue store-door delivery at current price levels to the vast number of their remaining low volume accounts, then no other distribution system can do so either. Alternative systems either do not reach all these accounts or, if they do, they would require a massive infusion of trucks, warehouses and employees, the investment in which would immediately need to be defrayed by price increases above current levels. In essence, therefore, in regard to at least three-quarters of the soft drink market, consisting of a vast number of outlets which would remain to be supplied after chains began distributing all soft drinks through central warehouses, the public would suffer two major disadvantages. First, the availability of soft drinks would diminish since store-door delivery would become uneconomic to substantial numbers of existing accounts and no alternative channel of distribution would be economicaly feasible etiher. Second, in those remaining outlets which continued carrying branded soft drinks, prices must inevitably rise to cover the high costs of delivery to a wide assortment of dispersed low volume outlets which costs no longer would be offset by the more profitable high volume deliveries to supermarkets. The outlets, themselves, would like wise suffer; those which have to give up carrying soft drinks will lose reveneus from a previously profitable item and those which continue selling soft drinks will find demand shrink as the upward movement of their prices makes them ever less competitive with the food chains.

D. IT IS INEVITABLE FROM THE FOREGOING THAT ABROGATION OF TERRITORIAL FRANCHISES WILL SPELL FINANCIAL RUIN AND DESTRUCTION PARTICULARLY TO BOTTLERS THAT ARE NEITHER LARGE NOR PUBLICLY OWNED

It is estimated that the investment just of Pepsi-Cola's franchisees is in the neighborhood of one billion dollars. In the smaller operations, up to 500,000 cases per year, in which category fall 138 Pepsi-Cola single-franchisees, the investment may run close to $2.00 per case. In the medium size, where sales run from 500,000 to two million cases per year, a category which embraces another 127 Pepsi-Cola single-franchisees, investment averages up to $1.50 per case. The remaining large franchisees, which have facilities selling two million or more cases per year, probably have an investment of $1.00 per case.* It is not only in the bottlers' or Pepsi-Cola's interest, but in the public interest, that the invest-

*See p. 49, *supra*.

ments of those vulnerable to the restructuring envisioned by the FTC not go down the drain.

That these investments will be lost is demonstrated by Cresap, McCormick & Paget, a leading industrial research organization, in its study of the impact of the FTC complaint on the future of the soft drink industry (July 1972, hereafter "Cresap"). As the inevitable conclusion, according to Cresap (p. 9), "between 75 and 92 per cent of the bottlers studied would probably not be able to operate their soft drink operations profitably." The Cresap analysis goes on to conclude that bottlers, who lose the chain store business, will not be able to secure from their remaining customers price increases of a magnitude necessary to restore their profitability. As a result, the value of most bottlers' investments would be sharply reduced and "many of the bottlers probably would not be able to sell or merge their soft drink operations. Thus, they would be forced out of business, and would lose their entire financial investment, if the FTC order prevails" (Cresap, p. 10). Surely this conclusion is inescapable. After a large, strong bottler has "skimmed the cream" from a contiguous franchise, why would he pay for the duplicate investment in plant and equipment of the neighboring franchise?

Actually, the FTC staff has taken even another step which would make it even harder for a bottler in difficulty to realize on his investments. It has bombarded more than twenty-five large bottlers with extensive investigative questionnaires probing their past acquisitions as possible violations of the Federal Trade Commission Act. If the larger bottlers which survive the FTC challenge are to be legally intimidated by the FTC from making further acquisitions, then who will offer a "buy out" opportunity to a bottler in financial straits? Whether intended or not, the direction taken by the FTC staff discourages bottler consolidations and leaves the smaller and less successful bottlers in an untenable economic position.

Has the soft drink bottling industry so disserved the public that it deserves such a fate?

Not where the public is benefiting from the fact that the number of soft drink brands on the market today are at a peak, affording opportunities to purchase both in regular or diet form, and competition continues to be stimulated by successful new entrants.

Not where the public is benefiting from being able to pick from a wide variety of sizes and containers, from 10-oz. to 64-oz. bottles, in both returnable and non-returnable form, plus 12-oz. cans, and which include such consumer features as the relatively new resealable closures, package hand-grip for large bottles and a shatterproof plastic bottle.

Not where the public is benefiting from a wide range of prices for private labels to national brands, with choices to fit every pocketbook, and with the opportunity to purchase national brands in larger size returnable/resealable packages on a per ounce price basis when has increased very little over the past twenty years and presently is directly competitive with private labels.

Not where the public is benefiting from having numerous small businesses able to contribute to the vitality and well-being of communities throughout the country and to provide a wealth of local employment opportunities.

Although the FTC aims to curb business concentration, it blunders in not appreciating that the present franchise system is a useful brake on consolidations. It prevents larger neighboring bottlers from *forcing* the smaller bottler to sell. The franchise system allows for evolutionary consolidation, which is taking place in an orderly fashion without the cataclysmic dislocations of resources and overnight losses of equity which the FTC position would produce.

In short, there is no public goal—social, economic or governmental—which warrants the manifest injustice which the FTC would inflict upon many hundreds of independent bottlers throughout this country.

E. THE COLLATERAL ADVERSE EFFECTS OF THE FTC'S ACTION INCLUDE FEWER BOTTLERS, FEWER BRANDS, REDUCED DISTRIBUTION AND HIGHER PRICES

The FTC's attack upon the soft drink industry is already having an inhibiting effect. It is an understatement to say that bottlers face an uncertain future. Investment and growth cannot flourish in such an atmosphere. That is why early action by Congress to lift this cloud is so imperative.

But, if the FTC prevails, the adverse consequences of today's uncertainties will pale in comparison to the realities of tomorrow. The ratio of investment to sales is too high to warrant capital outlays except in markets where a bottler has clear brand control. Bottlers cannot be expected to invest competitively in the same market area. To do so would be financial suicide for one of them, and probably both, since the dilution of a market, the inability of either bottler to develop fully the potential for a given brand, would reduce investment pay backs below break-even points.

Similarly, "piggybacking", the managing of several brands by a bottler, is an economic way of life in the soft drink industry. Multi-brand bottlers exist for the most part because the additional volume generated by secondary brands (as distinguished from major brands such as *Pepsi* and *Coca-Cola*) adds needed revenue which helps absorb the bottlers' high fixed costs. At the same time, "piggybacking" provides ease of entry to the secondary brands without which the industry would be restricted to high-volume brands and bottlers with particularly favorable economics. This is not necessarily unique to the bottling industry. A somewhat similar situation exists in the wholesaling of magazines which, much like soft drink distribution, is handled on a store-door basis to a variety of dispersed low-volume news stands and other outlets. In many markets, there is but a single wholesaler who is the sole source of all publications in a specific geographic area.

Without territorial franchises, bottlers will pursue full exploitation of their more profitable major brand lines, like *Pepsi* and *Coca-Cola*, to the detriment of secondary brands such as *Dr. Pepper*, *7–Up* and *Hires*. As the larger bottlers spread out into the territory of their neighbors, the concentration of marketing efforts, manpower and capital investment required for the major brand would, in most instances, not justify the economics of a second product line. By the same token, those bottlers who lose out in the competitive race to supply chain warehouses will themselves face extinction and likewise will not remain viable vehicles for "piggybacking." The consequence is a shrinkage of brand alternatives to the consumer and the diminution in interbrand competition.

Turning to the overall effects of the FTC's program, they can be easily summarized: distribution and competition will be reduced and prices will be increased. Every aspect of the chain of events which can be logically anticipated if territorial franchises are abrogated points to these conclusions. None are inconsistent. The short of it is that the FTC has made a mistake. However good intentioned, its position threatens harm to the economy, serious disadvantages to the public and drastic financial penalties to many innocent businessmen. It is surely the role of Congress to take the necessary preventive steps by legislative action.

Appendix A—Store-Door Versus Chain Warehouse

The store-door system to chains is only marginally more expensive than the existing chain warehouse system. Two studies (1) the Cresap, McCormick & Paget study (Warehouse versus Direct Delivery to Chain Stores: 1965) and (2) the Pepsi-Cola Grand Union Study (A Study of Soft Drink Profitability—In a Major Grocery Chain: 1968), illustrate the costs of handling product through the warehouse compared to store-door delivery.

The Cresap study measured costs by the application of time and motion study techniques to a Southern California *Pepsi* bottler operation. All bottler and chain direct costs for personnel and equipment (including depreciation) were calculated, computed for time actually spent on the specific operations. Period costs, such as for warehouse and store occupancy, were not included. Store-door delivery costs were calculated directly; costs for warehouse delivery, not a reality for Pepsi-Cola products, were estimated by extrapolation of time required to service similar products through the warehouses.

Data for the Grand Union study was a combination of actual chain "charges" for freight and warehouse handling in two Grand Union warehouses, and averages of findings of existing studies yielding costs for in-store movement from back rooms, stocking of shelves, and handling of returnable bottles (factored down 20% to allow for attrition in glass sold compared to glass returned).

The Cresap study yielded a $.14/case savings for warehouse delivery versus store-door on returnable bottles, and a $.09/case savings for convenience packages, as below:

TOTAL PER CASE COSTS TO HANDLE

	Returnables		Convenience	
	Store-door	Warehouse	Store-door	Warehouse
Bottler costs	$0.28	$0.06	$0.20	$0.05
Chain cost	.15	.23	.04	.10
Total cost	.43	.29	.24	.15
Difference		.14		.09

The Grand Union study (restricted to chain costs of handling convenience packages) developed a $.22/case cost to the chains, considerably above the $.10/case cost calculated by Cresap. This difference probably resulted from the use of chain "charges" for warehousing and freight in the Grand Union study, more inclusive than the primarily "labor only" charges calculated by Cresap.

Factored up to 1972 at 5% per year to allow for increases in costs since 1965, the differences, warehouse versus store-door, as developed in the Cresap study are as below.

TOTAL PER CASE COSTS TO HANDLE

	Returnables		Convenience	
	Store-door	Warehouse	Store-door	Warehouse
Bottler costs	$0.39	$0.08	$0.28	$0.06
Chain costs	.21	.32	.05	.14
Total	.60	.40	.33	.20
Difference		.20		.13

Even expressed at 1972 levels, the savings are relatively small. Since only convenience packages would be warehoused, only the smaller figure is pertinent, a $.13/case saving.

THE LEGALITY OF EXCLUSIVE REPRESENTATION AGREEMENTS AND TERRITORIAL PROVISIONS ANCILLARY TO TRADEMARK LICENSING

LEGAL MEMORANDUM ON BEHALF OF RESPONDENT IN THE MATTER OF PEPSICO, INC., FEDERAL TRADE COMMISSION DOCKET NO. 8856

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THE LEGALITY OF EXCLUSIVE REPRESENTATION AGREEMENTS AND TERRITORIAL PROVISIONS ANCILLARY TO TRADEMARK LICENSING

Introduction

The proceedings instituted by the Federal Trade Commission against various soft drink companies seek to declare unlawful and invalidate the exclusive territorial provisions of bottling franchise agreements which are the foundation stone on which the American soft drink industry is based. The Commission's attack on these provisions raises three key legal issues: (1) the legality of exclusive representation agreements; (2) the validity of the franchisor's control of the location of the place of business of his franchisees; and (3) the lawfulness of ancillary territorial restrictions in trademark license agreements. This memorandum of law, reviewing the precedents from the earliest days of the Common Law through and including the decisions under Federal and State antitrust statutes, will show that contract provisions like those now being challenged by the Federal Trade Commission have been repeatedly and consistently sustained by the Courts, that the legal premises upon which the Commission is proceeding are entirely unfounded, and that the Commission is seeking without justification in precedent, reason or policy to extend the frontiers of the law to condemn arrangements long recognized as entirely lawful.

A. The Legality of Exclusive Representation Agreements.

At no time in our law has there been the slightest doubt concerning the legality of exclusive representation agreements which impose a restriction upon the franchisor and confer a benefit upon the franchisee. Typically, such an agreement prevents the seller from dealing with anyone

other than his exclusive representative in a defined area. The franchisee is thus the exclusive manufacturer or seller in his allotted territory. No one else—neither the franchisor nor any other seller—may be authorized to sell the products covered by the franchise within the assigned area.

Although it has not been called upon to deal directly with the validity of such arrangements, the United States Supreme Court has indicated without any qualification whatsoever that it is entirely lawful under the antitrust laws for a franchisor to confer such exclusive rights upon his appointed representative. The United States Courts of Appeals without dissent have uniformly upheld such agreements. This has been true not only in the early but in the recent cases as well.

Reference is made in this memorandum to the Common Law cases prior to the enactment of the Sherman Law as well as the decisions under State antitrust legislation in order to show that the present law as enunciated by the Supreme Court as recently as 1967 has its roots in the body of cases from which the Sherman Law derived its basic concepts of restraint of trade and monopolization. There is no field of law, and certainly no branch of antitrust, in which there has been such unique uniformity of judicial decision.

But it is not only *stare decisis* which upholds exclusive representation agreements. The writings of business economists and marketing experts, some of which are discussed at pp. 20-24, *infra*, point out the many business justifications for this practice which is prevalent throughout the length and breadth of our economy. We are not urging that exclusive representation be permitted today merely because it has been lawful in the past. We urge that the practice be immune from attack because it has

served and continues to serve an essential function in the modern marketing of trademarked products and is integral to the entire system of franchising. As shown in the Fact Statement in Support of Legislation Upholding Exclusive Territorial Arrangements in the Soft Drink Industry, submitted in support of the testimony of the President of the Pepsi-Cola Bottlers' Association (hereinafter the "Pepsi-Cola Bottlers' Fact Statement"), without exclusive representation there would have been no soft drink industry as we know it today.

If both law and policy so powerfully support exclusive representation, the question naturally arises as to why legislation should be sought to validate that which is already lawful. The answer is simple. The Commission, by instituting these proceedings, has cast a cloud over exclusive representation which already has had a serious adverse effect upon this industry. That cloud should be immediately removed. Thousands of independent businessmen, employees and shareholders should not have to await the outcome of protracted administrative proceedings and ensuing Court review before legislative relief is sought, especially since the Courts may themselves tell the industry to go to Congress for relief.*

The Commission staff, in their submission to the Senate Committee on the Judiciary and the House Interstate and Foreign Commerce Committee, has attempted to argue that exclusive representation is not being questioned by the Commission. It is noteworthy that the authors of the staff memorandum specifically assert that they are speaking for themselves and not for the Commission. In other words, the Commission is free to adopt a different position. The fact is that the views set forth herein con-

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* *See, e.g.,* United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

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cerning the legality of exclusive representation were submitted both to the Commission staff and to the Commission before the complaints issued. It would have been a simple matter for the Commission to have indicated in its complaints that exclusive representation was not being attacked. This the Commission did not do. One cannot read the complaint in its entirety and the proposed order without concluding that the legality of exclusive representation is in serious jeopardy.

Nor have counsel in support of the FTC complaint taken a forthright stand that the cases will be tried on the assumption that exclusive representation is lawful. They seek to have their cake and eat it too by suggesting on the one hand that exclusive representation is not being questioned and on the other praying for an order which would forbid the inclusion by the franchisor in its franchise agreements of any limitation on the location of the franchisees' selling or distribution outlets.* An exclusive

* The proposed order annexed to the FTC's complaint against PepsiCo, Inc. would forbid PepsiCo from:

"1. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, including consignment agreement, to:

. . . .

(b) restrict the location of a bottler's place of business;

. . . .

(d) engage in any act, practice or conduct having like or similar purpose or effect.

"2. Imposing or attempting to impose any limitations or restrictions respecting:

. . . .

(b) the location of the bottler's place of business;

. . . .

(d) engaging in any act, practice or conduct having like or similar purpose or effect.

"3. Refusing to sell, threatening to refuse to sell or impairing sales to any bottler anything used in the manufacture and

without such restriction is a contradiction in terms. Exclusivity presupposes a defined area within which the exclusive rights are to be exercised and patently the location of the franchisee's place of business must be confined to that area. If our fears are ill-founded, the Commission through its counsel can officially, formally and in a binding manner before the Hearing Examiner take this issue out of these cases by affirming without reservation or qualification that the legitimacy of exclusive representation is recognized by the Commission and that nothing occurring in the pending proceedings will cast any doubt upon its continued vitality.

B. The Validity of the Franchisor's Control of the Location of His Franchisees' Place of Business.

The FTC's complaint, as originally proposed, was broad enough to prohibit any control over the franchisees' place of business, including not only the place of sale but also the location of the franchisees' bottling plants. In other words, under the proposed complaint, PepsiCo could not control the location of the manufacturing plants of any of its bottlers. This, of course, would mean that any bottler could establish a manufacturing plant anywhere in the United States in accordance with his own business desires and that the bottlers' rights of exclusive representation would have been thoroughly subverted. In the complaint as filed the term "place of business" is defined to include sale and distribution facilities, but not the franchisees' place of manufacture. This means that the franchisor can control the location of his franchisees' manufacturing plants but

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sale of soft drink products, including but not limited to, concentrate, pre-mix concentrate, post-mix concentrate, or the container in which they are sold; or in any way penalizing any bottler because of the:

. . . .

(b) the location of the bottler's place of business."

not the location of the places where they sell or distribute the beverages they produce.

The legal basis for any such distinction is not readily apparent. In its submission, the Commission staff flatly asserts that vertically imposed restrictions on location are unlawful. In so contending, the staff disregards the uniform current of Sherman Act adjudication upholding such restrictions as reasonable restraints of trade. In essence, they are asking the Commission to overturn this body of prior precedent.

Indeed, the Commission staff destroys its own credibility by admitting in one breath that exclusive representation is lawful while in the next breath contending that the control of the location of a place of business of a franchisee is an illegal restraint of trade and an unfair method of competition. What is the meaning of an exclusive right to sell the franchisor's trademarked product within a specified area if other bottlers may establish sales depots or distribution warehouses in the same territory from which they make sales and ship to the customers of the exclusive franchisee? If other bottlers may sell within the territory allotted to the exclusive franchisee, exclusive representation is completely eviscerated and becomes a mockery. Exclusivity means that only one person is authorized to sell in the area. When a territory is open to sales by others, there is no exclusive representation. Obviously, there can be no exclusivity if the franchisor is prohibited by Commission order from preventing other franchisees from locating in territory previously assigned to the exclusive franchisee.

C. The Lawfulness of Ancillary Territorial Restrictions in a Trademark License Agreement.

The pending FTC proceedings are concerned with the legality of vertical restrictions imposed by franchisors in

the exercise of their own independent business judgment. They have nothing to do with traditionally unlawful horizontal restraints, such as agreements for the division of markets or the allocation of customers. Here again, the Commission staff have been somewhat ambivalent. Initially, they argued in one breath that such vertical restraints are *per se* illegal under the antitrust laws and in another breath that the restriction is unreasonable in point of fact under a rule of reason approach. Now, while this memorandum was at press, they have suddenly and unexpectedly moved for partial summary judgment on the ground that vertical territorial restraints are unlawful *per se.*

The Commission staff rely primarily upon the Supreme Court's 1967 decision in the *Schwinn** case. We submit that this reliance is wholly misplaced. As we show below (pp. 75-85, *infra*), the Supreme Court's decision did not deal with restrictions on the franchisee's place of business and the validity of territorial restrictions in trademark licensing agreements was not in issue. In fact, *Schwinn* plainly recognized the legality of exclusive representation arrangements. Once the legality of exclusive representation has been recognized, it makes no sense to subvert it by invalidating restrictions on location or by refusing to recognize the validity of ancillary territorial restrictions which give meaning and vitality to exclusive representation in a trademark licensing context. While the language of the *Schwinn* decision relied on by the FTC staff is dictum and its soundness is open to question as a matter of law, as we show at pp. 47-55, *infra,* in any event it is not decisive of the issues raised by the complaints in the pending soft drink cases and as a matter of policy, any application of *Schwinn* in the soft drink proceedings would be harmful to

* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

the public interest, which the Congress as a legislative body should protect.

In short, the Commission is endeavoring to make new law. It seeks to go beyond the bounds of all prior precedent by declaring unlawful vertically imposed territorial restrictions in a trademark license agreement and would destroy the very exclusive rights to bottle and sell trademarked soft drinks in a particular territory which have been responsible for the growth of competition in the soft drink industry. As explained in the Pepsi-Cola Bottlers' Fact Statement, those exclusive rights of manufacture and sale have made it possible for new companies and new products to enter the market and create a business climate in which there can be orderly change to meet new conditions without depriving established independent businessmen of the value of their investments. They protect small local bottlers from being driven out of business without compensation for the value of their businesses. The pending FTC proceedings, if they are allowed to succeed, would change all that. Bottlers' exclusive territories would no longer be exclusive, since neighboring bottlers of the same trademarked products would be free to establish sales and distribution outlets within them, and the structure which has made possible an orderly evolution to meet changing business conditions would be destroyed to make way for the theoretical speculations of the Commission staff as to how the soft drink industry should operate.*

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* In its memorandum in support of its motion for partial summary judgment the Commission staff has devised a plan for a "metro bottler handicap provision" which, incredibly, would require large bottlers and those owned by franchise companies to abide by the territorial provisions which the staff claims are *per se* illegal while making exception for small bottlers for a period of ten years.

I.

Exclusive Representation Agreements Are Valid At Common Law and Under the Sherman Act.

A. The Validity of Exclusive Distributorships Under Common Law Has Never Been Questioned.

For more than a century it has been customary for manufacturers to grant their dealers the exclusive right to sell their products within a defined territory. Both before and after the enactment of the Sherman Law, the Courts have uniformly upheld such exclusive representation agreements. By its very nature an agreement for exclusive representation restricts the seller from doing business himself or selling to another dealer within the same territory.

These arrangements were challenged as unreasonable restraints of trade but the Courts without dissent found that the restrictions on competition were entirely reasonable. A typical case at Common Law was *Newell* v. *Meyendorff,** decided on the very eve of the promulgation of the Sherman Act. In that case a cigar manufacturer agreed to give a distributor the sole and exclusive right of selling and handling a brand of cigars in Montana. When the manufacturer sued for the price of cigars sold and delivered, the distributor successfully set up as a recoupment the manufacturer's breach of the exclusive representation contract. The Court in a comprehensive rule of reason analysis sustained the exclusive representation contract. There are countless decisions to the same effect.**

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* 9 Mont. 254, 23 P. 333 (1890).

** *E.g.,* Arkansas: Keith v. Herschberg Optical Co., 48 Ark. 138, 2 S.W. 777 (1887); Idaho: Independent Gas & Oil Co. v. T. B. Smith Co., 51 Idaho 710, 10 P.2d 317 (1932); Illinois: Brown v. Rounsavell, 78 Ill. 589 (1875); Weiboldt v. Standard Fashion Co., 80 Ill. App. 67 (1899); Kansas: W. W. Roller & Co. v. Ott, 14

Exclusive arrangements in the nineteenth and early twentieth centuries were in widespread use in the transportation industry. They, too, were challenged as contravening the Common Law rules on restraints of trade but such attacks were uniformly unsuccessful. For example, a Massachusetts Court refused to strike down an agreement by an obligor on a bond to give all his freighting on goods sent up and down the Connecticut River to one boating company.* The Court said:

> "An agreement with a tradesman to give him all the promissor's custom or business, upon fair terms, and not to encourage a rival tradesman to his injury, can hardly be considered as a restraint of trade. Certainly it is not such a restraint as would be injurious to the public . . . ." 20 Mass. (3 Pick.) at 192, 15 Am. Dec. at 206.**

In addition there have been numerous suits by an exclusive distributor where the manufacturer has sold to

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Kan. 609 (1875); Nebraska: Woods v. Hart, 50 Neb. 497, 70 N.W. 53 (1897); New Jersey: New York Trap Rock Co. v. Brown, 61 N.J.L. 536, 43 A. 100 (1898); Paragon Distributing Corp. v. Paragon Laboratories, Inc., 99 N.J.Eq. 224, 129 A. 404 (1925); New York: New York Bank Note Co. v. Hamilton Bank Note Engraving and Printing Co., 180 N.Y. 280, 73 N.E. 48 (1905); Van Marter v. Babcock, 23 Barb. 633 (N.Y. Sup. Ct. 1857); Blauner v. Williams Co., 36 Misc. 173, 73 N.Y.S. 165 (Sup. Ct. 1901); Live Stock Ass'n v. Levy, 54 N.Y. Super. Ct. 32 (N.Y.C. Super. Ct. 1886); Vermont: Clark v. Crosby, 37 Vt. 188 (1864).

* Palmer v. Stebbins, 20 Mass. (3 Pick.) 188, 15 Am. Dec. 204 (1826).

** *See also* Black and White T. & T. Co. v. Brown and Yellow T. & T. Co., 276 U.S. 518 (1928); Brown v. New York Cent. & H. R.R., 75 Hun. 355, 27 N.Y.S. 69 (App. Div. 1894), *appeal dismissed,* 151 N.Y. 674, 46 N.E. 1145 (1897); Wiggins Ferry Co. v. Chicago & Alton R.R., 73 Mo. 389, 39 Am. Rep. 519 (1881); Commonwealth v. Delaware and Hudson Canal Co., 43 Pa. 295 (1863).

someone else or has directly competed with the distributor. In none of these cases did the Courts question the validity of exclusive distributorships. Typically the only question for decision was the correct measure of damages for violation of the exclusive arrangement. For example, in *Russell v. Horn, Brannen & Forsyth Mfg. Co.,** the Court said:

> "We agree . . . that where one person has by contract the exclusive right to buy from another and resell within a certain territory goods in which such other person enjoys a monopoly, and such other person, in violation of his contract, sells such goods to other persons within the territory, the measure of damages is the profit which such first person may with reasonable certainty show that he would have realized if the contract had been performed by the other party." 41 Neb. at 573, 59 N.W. at 903.**

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* 41 Neb. 567, 59 N.W. 901 (1894).

** *Accord,* United States: Willcox & Gibbs Sewing Mach. Co. v. Ewing, 141 U.S. 627 (1891) (Harlan, J. applying "pre-*Erie*" general law); Delaware, Lackawanna and Western R.R. v. Morristown, 276 U.S. 182 (1928); Arkansas: Rudolph v. Laser, 156 Ark. 5, 245 S.W. 302 (1922); California: Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 41 P. 1020 (1895); Schiffman v. Peerless Motor Car Co., 13 Cal. App. 600, 110 P. 460 (Ct. App. 1910); Indiana: Johnston v. Franklin Kirk Co., 83 Ind. App. 519, 148 N.E. 177 (1925); Iowa: Kaufman v. Farley Mfg. Co., 78 Iowa 679, 43 N.W. 612 (1889); Rosenberger v. Marsh, 108 Iowa 47, 78 N.W. 837 (1899); Hirschhorn v. Bradley, 117 Iowa 130, 90 N.W. 592 (1902); Atlas Brewing Co. v. Huffman, 217 Iowa 1217, 252 N.W. 133 (1934); Kansas: Sparks v. Reliable Dayton Motor Car Co., 85 Kan. 29, 116 P. 363 (1911); Kentucky: White Co. v. W. P. Farley & Co., 219 Ky. 66, 292 S.W. 472 (1927); Michigan: Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 N.W. 319 (1891); Garlock v. Motz Tire & Rubber Co., 192 Mich. 665, 159 N.W. 344 (1916); New York: Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 4 N.E. 264 (1886); Standard Fashion Co. v. Ostrom, 16 App. Div. 220, 44 N.Y.S. 666 (1897); Tennessee: Curtiss Candy Co. v. Silberman, 45 F.2d 451 (6th Cir. 1930) (Tennessee law applicable); Wisconsin: W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 N.W. 918 (1904).

B. The Common Law Rule Was Codified by the Sherman Act and Exclusive Franchises Have Been Uniformly Upheld From the Inception of the Antitrust Laws Down to the Present Time.

Enactment of Section 1 of the Sherman Act in 1890 did not affect this long-settled recognition of the legality of exclusive distributorship arrangements. Rather, it simply codified the Common Law of restraint of trade, which had uniformly enforced such agreements.

The legislative history on this point is very clear. Senator Sherman himself said that language similar to that ultimately enacted "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."* Senator Hoar, who was closely involved in drafting the final version in committee said on the floor of the Senate: "[W]e have affirmed the old doctrine of the common law in regard to all interstate and international commercial transactions . . . ."** Senator Edmonds, Chairman of the Judiciary Committee that reported out the Sherman Act, also indicated that the Sherman Act was simply a codification of the Common Law.***

Thirteen years after the enactment of the Sherman Act, Senator Hoar repeated on the floor of the Senate that the law did not alter the substantive law of restraint of trade when he said:

> "We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in

* 21 Cong. Rec. 2456 (1890).

** 21 Cong. Rec. 3146 (1890).

*** 21 Cong. Rec. 3152 (1890).

> restraint of trade. *It was believed that the phrase 'in restraint of trade' had a technical and well understood meaning in the law.*" 36 Cong. Rec. 522 (1903) (emphasis added).

These remarks were later quoted approvingly by the Supreme Court in *Apex Hosiery Co.* v. *Leader.**

In *Apex Hosiery* the Court presented an extensive discussion of the legislative history and meaning of Section 1 of the Sherman Act. The Court held that the phrase "restraint of trade" had a well-understood meaning in Common Law and was made the means of defining the activities prohibited in the Sherman Act.** The Court, speaking through Justice Stone, went further and stated in language as clear as can be:

> "This Court has . . . repeatedly recognized [since 1899] that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law." 310 U.S. at 498.***

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* 310 U.S. 469, 489 n. 2 (1940).

** *Id.* at 494-495.

*** *See also* United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 386 n. 7 (1956); United States v. American Tobacco Co., 221 U.S. 106, 179 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 54-55, 58 (1911); *cf.* Cline v. Frink Dairy Co., 274 U.S. 445, 460-461 (1927). Lower Federal and State Courts have similarly held without dissent that the Sherman Act codifies the substantive Common Law of restraint of trade. *E.g.*, Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, 182 F.2d 158, 167 (9th Cir.), *cert. denied*, 340 U.S. 827 (1950); United States v. Addyston Pipe & Steel Co., 85 F. 271, 279 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899); Elizabeth Hospital, Inc. v. Richardson, 167 F. Supp. 155, 161 (W.D. Ark. 1958), *aff'd*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); United States v. Greater Kansas City Chapter Nat. Elec. Contractors Ass'n, 82 F. Supp. 147, 149 (W.D. Mo.

Early challenges to exclusive representation arrangements under Sherman Act § 1 were resolved by findings of validity as Courts had done under Common Law. For example, in *Locker* v. *American Tobacco Co.** the manufacturer appointed a sole distributor for greater New York. When the distributor who sold through jobbers decided to sell directly to retailers, bypassed jobbers sued. In affirming the grant of a directed verdict for the defendants, the Court said:

> "We can think of no reason based on the common law or the Sherman Law which required the introduction of a second jobber or wholesaler between the producer and the consumer. In short, we are convinced that what was done by these defendants was not prohibited by law, but was a reasonable commonsense trade arrangement dictated by the exigencies of the situation. We see nothing forbidden by the Sherman Act in a manufacturer consigning or selling his product to a jobber for a particular territory . . ." 218 F. at 450.**

State Courts reached the same result when applying "baby Sherman Acts," sometimes along with the Federal antitrust statute.***

1949); United States v. Aluminum Co. of America, 44 F. Supp. 97, 104-105 (S.D.N.Y. 1941), *aff'd in part, rev'd in part,* 148 F.2d 416 (2d Cir. 1945); Levin v. Sinai Hospital of Baltimore City, 186 Md. 174, 182, 46 A.2d 298, 302 (1946).

To the same effect *see, e.g.,* H. Thorelli, *The Federal Antitrust Policy* 183 (1954); W. Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Act* 96-97 (1965); E. Berman, *Labor and the Sherman Act* 48-49 (1930).

* 218 F. 447 (2d Cir. 1914).

** *Cf.* Cole Motor Car Co. v. Hurst, 228 F. 280 (5th Cir. 1915), *cert. denied sub nom.* Tillar v. Cole Motor Car Co., 247 U.S. 511 (1918); Phillips v. Iola Portland Cement Co., 125 F. 593 (8th Cir. 1903), *cert. denied,* 192 U.S. 606 (1904).

*** *E.g.,* Independent Gas & Oil Co. v. T. B. Smith Co., 51 Idaho 710, 10 P.2d 317 (1932); Mar-Hof Co. v. Rosenbacker, 176 N.C.

The two leading modern cases on exclusive representation were in the United States Courts of Appeals and both resoundingly upheld the validity of exclusive representation.

In *Packard Motor Car Co.* v. *Webster Motor Car Co.*,* one of three Packard dealers, the largest in Baltimore, said he was losing money and would stop handling Packard cars unless it received the sole right to handle Packard cars in Baltimore. Packard acceded and told the two other Baltimore dealers that their dealership contracts would not be renewed. Although the lower court upheld a jury verdict finding a violation of the Sherman Act, the Court of Appeals decided that the exclusive representation arrangement was perfectly valid. The Court noted that when an exclusive dealership

> "'... is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality' until the District Court decided the present case." 243 F.2d at 420.

In a similar litigation just prior to *Packard*, the United States Court of Appeals for the Fourth Circuit reached the same result.** The Court of Appeals there said,

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330, 97 S.E. 169 (1918); Anheuser-Busch Brewing Ass'n v. Houck, 27 S.W. 692 (Tex. Civ. App. 1894), *aff'd on other grounds,* 30 S.W. 869 (1895); *cf.* McConkey v. Smith, 112 Kan. 560, 211 P. 631 (1923); Zellner Mercantile Co. v. Parlin & Orendorff Plow Co., 98 Kan. 609, 159 P. 391 (1916).

* 243 F.2d 418 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957).

** Schwing Motor Co. v. Hudson Sales Corp., 239 F.2d 176 (4th Cir. 1956), *cert. denied,* 355 U.S. 823 (1957).

"[t]here is no allegation or contention that the exclusive dealership was a part of or incidental to any conspiracy to monopolize or restrain trade between manufacturers or wholesale dealers." * The District Court's opinion,** which was adopted by the Court of Appeals, said that exclusive representation agreements are limited monopolies which are valid unless used to extend a producer's monopoly into other fields. The District Court said:

> "[T]he mere fact that such an [exclusive representation] agreement necessarily gives the dealer a monopoly in handling the product of the particular manufacturer in a given area, and thereby enables the dealer to dictate the price at which the products of that manufacturer shall be sold in that area, subject to competition with the products of other manufacturers, does not condemn such agreements; otherwise all exclusive agency agreements would be illegal per se." 138 F. Supp. at 903.

In 1920 the United States District Court for Delaware upheld and enforced the agreements whereby the Coca-Cola Company had granted to a predecessor of Coca-Cola (Thomas) the sole and exclusive right to use the COCA-COLA trademark on bottled Coca-Cola in a described territory and under which exclusive bottling rights had been granted to several hundred local bottlers.***

A Pepsi-Cola exclusive bottling appointment substantially the same as those involved in the current FTC proceeding was upheld in *Brosious* v. *Pepsi-Cola Co.*****

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* *Id.* at 177.

** 138 F. Supp. 899 (D. Md. 1956).

*** Coca-Cola Bottling Co. v. Coca-Cola Co., 269 F. 796 (D. Del. 1920).

**** 155 F.2d 99 (3d Cir. 1946).

The trial Court there dismissed the action brought under Sherman Act Sections 1 and 2 at the conclusion of the plaintiff's case and the Court of Appeals affirmed. The Court of Appeals said that the bottling contract between Pepsi-Cola and the bottler "was not of itself offensive to the monopoly phase of the Sherman Act," * and "that there is no evidence in the record of any monopolistic practice or unreasonable restraint of trade, interstate or intrastate, in the operation of the two corporations under the contract.** The Court said further:

> "We hold that the transactions . . . did not illegally restrain or restrict trade, or tend to create monopoly, that there was no illegal agreement between defendants, and that defendants committed no acts in the nature of a conspiracy to violate the anti-trust or other laws." 155 F.2d at 104.

In modern times numerous other courts have turned back challenges to exclusive representation agreements under the antitrust laws.*** Even the Federal Trade

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* *Id.* at 102.

** *Id.*

*** *E.g.,* Ark Dental Supply Co. v. Cavitron Corp., 1972 Trade Cas. ¶ 74,009 (3d Cir. 1972); Beverage Distributors, Inc. v. Olympia Brewing Co., 440 F.2d 21, 32, 33 (9th Cir. 1971), *cert. denied,* 403 U.S. 906 (1971); Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331 (2d Cir.), *cert. denied,* 345 U.S. 994 (1953); Fargo Glass & Paint Co. v. Globe American Corp., 201 F.2d 534 (7th Cir.), *cert. denied,* 345 U.S. 942 (1953); Top-All Varieties, Inc. v. Hallmark Cards, Inc., 301 F. Supp. 703 (S.D. N.Y. 1969); Potter's Photographic Applications Co. v. Ealing Corp., 292 F. Supp. 92 (E.D.N.Y. 1968); United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (S.D.N.Y. 1942), *aff'd by an equally divided court,* 321 U.S. 707, 718-719 (1944).

Commission itself has refused to hold such arrangements invalid.*

The Supreme Court on several occasions in recent years has used strong dicta to indicate that exclusive representation arrangements are not in violation of the Sherman Act. In *United States* v. *Arnold, Schwinn & Co.*** the Supreme Court recognized:

> ". . . [A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods . . . . If the restraint stops at that point—if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act." 388 U.S. at 376

Similarly, the late Mr. Justice Black, speaking for the Court in *Klor's, Inc.* v. *Broadway-Hale Stores Inc.,**** held that something more is required than the establishment of a simple exclusive distributorship before there is a violation of the Sherman Act. There the Court said:

> "Plainly the allegations of this complaint disclose . . . a boycott. This is not a case of a single trader refusing to deal with another, nor even of a manufacturer

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* *E.g.*, Columbus Coated Fabrics Corp., 55 F.T.C. 1500, 1521-1522 (1959); General Cigar Co., 16 F.T.C. 537 (1930) (exclusive territorial appointments upheld).

** 388 U.S. 365 (1967).

*** 359 U.S. 207 (1959).

and a dealer agreeing to an exclusive distributorship." 359 U.S. at 212.*

Like the Courts, the secondary sources are unanimous in their view that exclusive representation arrangements are valid both at Common Law and under the Sherman Act. The authoritative *Restatement of Contracts* § 516(e) (1932) says that "A bargain to deal exclusively with another" is considered a reasonable restraint of trade provided that it does not effect or form "part of a plan to effect a monopoly." Illustration 7 to § 516(e) indicates that the agreements appointing exclusive agents in specified territories are not illegal unless part of a scheme to establish a monopoly. Exclusive selling agreements are virtually *per se* legal where there are other suppliers to whom competing buyers can turn.**

Professor Corbin has written along the same lines that agreements whereby a producer promises to sell his entire product to a single buyer are not considered illegal ordinarily, unless used for creating a monopoly or suppressing competition to an unreasonable degree.***

In the same vein Prof. Williston indicates that exclusive representation is valid and is frequently provided because the distributor must make a substantial investment and build up or maintain a business establishment for the distribution of manufacturer's products.****

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* *See also* White Motor Co. v. United States, 372 U.S. 253, 269 (1963) (Brennan, J., concurring).

** Robinson, *Restraints on Trade and the Orderly Marketing of Goods,* 45 Cornell L. Q. 254, 257 (1960).

*** 6A A. Corbin, *Contracts* §§ 1412, 1413 (1962).

**** 9 S. Williston, *Contracts* § 1017A (3d ed. 1967). *See also* Annot., 9 L.E. 2d 1235 (1963).

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C. There Are Sound Economic Justifications for Exclusive Representation Appointments Which Are Not Merely Beneficial to the Parties but Promote the Public Interest as Well.

Underlying the overwhelming case law and commentary supporting the validity of exclusive representation at Common Law and under the Sherman Act are the business justifications of such arrangements. A manufacturer's use of these arrangements has pro-competitive effects on his ability to compete with others. According to the literature a manufacturer or trademark holder can realize substantial economic benefits by appointing only one outlet or licensee per area. The Pepsi-Cola Bottlers' Fact Statement shows why and how these benefits accrue in the soft drink industry.

Like use of territorial restraints ancillary to trademark licensing, appointment of exclusive distributors limits outlets and reduces selling costs because the manufacturer need service far fewer people. In addition, credit risks can be minimized since the manufacturer may select only a dealer of unquestioned solvency and financial responsibility. Also, a single experienced dealer in an area can estimate with greater accuracy the forthcoming demand in his territory, thus facilitating the manufacturer's production planning. And in many instances the manufacturer may derive a certain prestige from associating with only one dealer—preferably the best, the "class" outlet—in each market. When a product lacks a familiar brand name, such reliance on the dealer's own goodwill may be an effective substitute for extensive advertising and thus open doors to the market for the manufacturer.*

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*McLaren, *Territorial Restrictions, Exclusive Dealing, and Related Sales Distribution Problems under the Antitrust Laws*, 11 Practical Lawyer 79 (April 1965); Note, *Exclusive Territorial Arrangements and the Antitrust Laws*, 39 Ind. L.J. 785 (1964); Note, *Restricted Channels of Distribution under the Sherman Act*, 75 Harv. L. Rev. 795, 805 (1962).

No matter how good a dealer may be, an exclusive arrangement may make him better since he knows that the benefit of his additional efforts and funds to increase sales will accrue only to him. The distributor, like any businessman, maximizes profits by equating marginal revenue with marginal cost. If his increased efforts to enlarge the demand for the manufacturer's product will redound not to his benefit alone but to the benefit of other distributors handling the same branded item, obviously he will refrain from expenditures which provide him with no additional profits. To avoid a situation so detrimental to its interest, the trademark proprietor creates an exclusive representative—a sort of quasi-partnership between the manufacturer and the licensee designed to maximize sales.

The distributor's efforts often are substantial. Even with national advertising by the manufacturer or franchisor there will always be the necessity for advertising and promotions by the local representative. In addition, there may be a substantial investment in retail outlets and other services depending upon the product. There may also be development costs in preparing the product for the local market. These initial costs will normally be borne by the first person to handle the product in a given area. If other distributors of the very same goods later enter the "pioneer's" market and compete with him, the area's initial developer is put at an economic disadvantage since the latecomers are spared the need of incurring introductory and development expenses. Before a prudent businessman will incur these costs he must have the assurance that he will be able recoup them.* Exclusive representation is de-

* The extra investment made by exclusive franchisees is protected judicially. An exclusive distributorship, otherwise terminable at will, cannot be cut off until there has been a reasonable opportunity to recover the cost in establishing the outlet. *E.g.*, Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 395 F.2d 388

signed to provide such assurance.*

These observations are uniquely pertinent to the soft drink industry. Historically, soft drink companies began as relatively small operations dependent upon their franchised bottlers to create product acceptance on the local level. They started in business in an era before the advent of television at a time when commercial radio was still primitive or non-existent. Often there was little capital available to finance introductory advertising and startup costs throughout the national market or to persuade established bottlers to switch over from proven profitable products to new and unknown drinks. The only way that a newcomer to the industry could convince small bottlers to take on his brand was to assure them through exclusive bottling franchises that there would be no free riders if and when success was achieved.

Although the trademarks typically are owned and held by the franchise company, the creation of goodwill at the local level is the result of efforts by both the independent local bottler and the franchise company. The local bottler must convince grocery stores, soda fountains and other outlets to carry his brand. The bottler must also place and pay for point of purchase advertising and other promo-

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(8th Cir. 1968); Allied Equipment Co. v. Weber Engineered Prods., Inc., 237 F.2d 879 (4th Cir. 1956); Des Moines Blue Ribbon Distributors, Inc. v. Drewrys Limited, U.S.A., Inc., 256 Iowa 899, 129 N.W.2d 731 (1964); *cf.* Koufakis v. Carvel, 425 F.2d 892 (2d Cir. 1970). A manufacturer is not contractually liable for terminating a non-exclusive distributor. *See, e.g.*, J. C. Millett Co. v. Distillers Distributing Corp., 258 F.2d 139 (9th Cir. 1958).

* Jordan, *Exclusive and Restricted Sales Areas under the Antitrust Laws*, 9 U.C.L.A. L. Rev. 111, 117 (1962); Note, *Vertical Restraints on Territorial Distribution*, 37 So. Cal. L. Rev. 332, 337 (1964); Note, *Exclusive Territorial Arrangements and the Antitrust Laws*, 39 Ind. L. J. 785, 790 (1969).

tional material. He must make a substantial investment in bottles, cases, bottling equipment, trucks, vending machines and kindred items. What is more natural than for a bottler, who will have to put so much effort and spend so much money in creating a local acceptance for a national product, to demand an exclusive distributorship to safeguard his heavy investment?* And the franchise company benefits as well since one aggresive dealer may be far more effective than several dealers in the same area.**

Goodwill, once created, does not last forever. There must be continuous, ongoing efforts at all times to keep demand at a high level, to say nothing about increasing it. Exclusivity is integral to the successful marketing of popular consumer items such as soft drinks.

Strong, independent bottlers, relying on the underlying assurance of an exclusive franchise for a nationally-known soft drink, will inevitably feel freer to introduce and successfully promote other drinks, both of their franchisors and of others, thus adding to rather than decreasing the number and variety of available products. Both retailers and consumers directly benefit from exclusive franchises in having dependable, resourceful and experienced distributors close at hand, who supply not only accepted brands, but also have the economic strength to market new products and take franchises from new entrants. This is reflected in better service from an exclusive dealer and acccss by the retailer and the purchasing public to a wider

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* *See generally* American Can Company, *Carbonated Beverages in the United States—Historical Review* 9-17 (1972).

** *See, e.g.*, Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957); Schwing Motor Co. v. Hudson Sales Corp., 239 F.2d 176 (4th Cir. 1956), *cert. denied,* 355 U.S. 823 (1957).

choice of competing products.* It is important, moreover, that consumers, as well as the soft drink companies, know the source of each product to assure that the quality and uniformity of the product be maintained. This, of course, occurs if there is normally but one source of supply in any given area, so that the exclusive franchisee knows that his business and reputation in the community are dependent on his maintenance of high and uniform quality.

Thus, the use of exclusive territorial arrangements has the beneficial effect of promoting a strong franchise system, often the only method by which small businessmen, according to the former General Counsel of the Small Business Administration, can compete in this era of sophisticated business techniques.**

D. Territorial Restraints Are Ancillary to Exclusive Distributorships and Necessary to Effectuate Them.

Exclusive distributors and trademark licensees are appointed in part to insure that the benefits of time and money expended to create local product acceptance accrue to the businessman assuming that burden. Otherwise, there would be inadequate distributor incentive to establish a local market. Yet, if there are no territorial restrictions on other franchisees, there is no effective way to protect against other franchisees' invading an exclusive territory and depriving the exclusive distributor of a sub-

* Note, *Exclusive Territorial Arrangements and the Antitrust Laws,* 39 Ind. L. J. 785, 790 (1964).

** Zeidman, *The Growth and Importance of Franchising—Its Impact on Small Business,* 12 Antitrust Bull. 1191, 1193 (1967). *See also* Day, *Exclusive Territorial Arrangements Under the Antitrust Laws—A Reappraisal,* 40 N.C.L. Rev. 223, 226-227 (1962); Jordan, *Exclusive and Restricted Sales Areas under the Antitrust Laws,* 9 U.C.L.A. L. Rev. 111, 119 (1962). The economic benefits of appointing exclusive franchises in the soft drink industry are more fully explored in the Pepsi-Cola Bottlers' Fact Statement.

stantial portion of his business.* To the extent that an exclusive distributor could expect to lose a portion of his potential business, he would be discouraged from making an initial investment, to both his and his franchisor's detriment. This problem is particularly acute where, as in the soft drink industry, the bottler operates at the wholesale level and traditionally seeks out and makes personal contact with his customers.

The exclusivity of a franchisee's appointment can be so important that an exclusive distributor will sue when his territory is invaded. A franchise company which grants exclusive distributorships faces the possibility of exposure if such raiding occurs and the only way such potential liability can be avoided is to place territorial restrictions in franchise appointments.

The leading case involving a franchisor's potential liability to an exclusive distributor because of another distributor's raiding from outside the territory is *Waldron Buick Co.* v. *General Motors Corp.*** There, General Motors appointed an exclusive Buick distributor for the city of Charlotte, N.C. Plaintiff was thereafter appointed a Buick distributor in nearby Concord and advertised in Charlotte newspapers and over a Charlotte radio station. Plaintiff also had agents in Charlotte to search out and refer prospective customers to it.

The Court held there was no antitrust violation when General Motors cut off plaintiff for continuing to sell in Charlotte, the area belonging to the exclusive distributor. The Court further held that the Charlotte dealer was to have exclusive selling rights in that town, implying there

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* Garlick, *Pure Franchising, Control and the Antitrust Laws: Friends or Foes?* 48 J. Urban Law 835, 869 (1971).

** 254 N.C. 117, 118 S.E.2d 559 (1961).

was a potential cause of action by the exclusive dealer against General Motors for breach of contract if the invading dealer were not stopped.* The Court further said, ". . . General Motors was obligated to recognize [the Charlotte dealer] as the sole and exclusive Buick dealer in the Charlotte area." **

In addition the Court suggested that the cut-off dealer may also have had a cause of action against General Motors since it was not prohibited by contract from selling in any area.*** General Motors could, of course, have precluded such liability to either dealer by use of territorial restrictions ancillary to the exclusive distributorship granted. Territorial restraints thus appear to be not only desirable, but necessary to protect a franchisor from exposure to liability to its distributors.

It is axiomatic in franchise law that a manufacturer may neither compete with the exclusive representative nor authorize others to do so within the exclusive's territory. This has consistently been the law since well before the turn of the century.****

Even though a manufacturer can neither compete directly with its exclusive representative nor permit another to do so

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* *Id.* at 125, 118 S.E.2d at 565.

** *Id.* at 126,118 S.E.2d at 566.

*** *Id.*

**** *E.g.*, Stewart-Warner Corp. v. Remco, Inc., 205 F.2d 583 (7th Cir. 1953); O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891 (Ky. 1967); Pacific Scientific Co. v. Glassey, 245 Cal. App. 2d 831, 54 Cal. Rptr. 235 (Dist. Ct. App. 1966); Curtiss Candy v. Silberman, 45 F.2d 451 (6th Cir. 1930); White Co. v. W. P. Farley & Co., 219 Ky. 66, 292 S.W. 472 (1927); Zellner Mercantile Co. v. Parlin & Orendorff Plow Co., 98 Kan. 609, 159 P. 391 (1916); W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 N.W. 918 (1904); Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 N.W. 319 (1891).

in its stead, distributors outside the exclusive's territory can still subvert the exclusivity unless the manufacturer prevents them from competing there. Ancillary territorial restrictions implement the franchisor's obligation to insure that his exclusive franchisee is indeed exclusive and thus protect the manufacturer from the potential exposure of claims by his exclusive franchisee if others compete in his territory.

II.

Reasonable Territorial Restraints Have Always Been Lawful.

A. Territorial and Kindred Restraints at Common Law.

At Common Law the legality of reasonable territorial and kindred restraints was beyond question. In 1889 in the seminal opinion of *Fowle* v. *Park,* the United States Supreme Court enforced a contract restricting the territorial limits within which the purchaser of a patent medicine formula could manufacture and sell the product, even though the restraint was unlimited as to time and the Court's decision was rendered more than forty years after the original contract was entered into between the buyer and the seller.* The Court reasoned:

> "Relating as these contracts did to a compound involving a secret in its preparation; based as they were upon a valuable consideration, and limited as to the space within which, though unlimited as to the time for which, the restraint was to operate, we are unable to perceive how they could be regarded as so unreasonable as to justify the court in declining to enforce them.
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> "The vendors were entitled to sell to the best advantage, and in so doing to exercise the right to preclude themselves from entering into competition with those who purchased, and to prevent competition between purchasers; and the purchasers were entitled to such protection as was reasonably necessary for their benefit. . . . If the public found the balsam efficacious, they were interested in not being deprived of its use, but by whom it was sold was unimportant." 131 U.S. at 97.

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* 131 U.S. 88 (1889).

Similarly, in the landmark case of *Oregon Steam Nav. Co.* v. *Winsor,** the United States Supreme Court enforced a covenant by the purchaser of a steamer not to run the ship in California waters, where it would compete with the seller's steamship business. The Court upheld the restrictive covenant as a reasonable restraint of trade. As the Supreme Court put it, it is "well settled that a stipulation by a vendee of any trade, business, or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business, or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding." ** Other early cases are in accord.***

The same result was obtained in more modern times. In *Tri-Continental Finance Corp.* v. *Tropical Marine Enterprises, Inc.***** a restrictive covenant prohibiting the purchaser of a vessel from operating between certain ports was found reasonable in time and territory and therefore not violative of the Sherman Act. To Chief Judge Hutcheson, the legality of the covenant was open and shut once he was satisfied that it was reasonable in spatial and temporal coverage: "Ancillary restrictions of this kind," he wrote,

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* 87 U.S. (20 Wall.) 64 (1873).

** *Id.* at 68.

*** *See, e.g.,* Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 75 S.C. 378, 55 S.E. 973 (1906); Pratt v. Marean, 25 Ill. App. 516 (1888); Dunlop v. Gregory, 10 N.Y. 241 (1851).

**** 265 F.2d 619 (5th Cir. 1959).

have "been uniformly sustained as valid." * In *Thomas* v. *Belcher*** the Supreme Court of Oklahoma upheld the validity of a restriction in a purchase agreement between a wholesaler and retailer confiining the latter to a defined territory as retailer of the goods sold.*** In *McConkey* v. *Smith,***** the Kansas Court, applying a State antitrust statute, upheld an exclusive dealership arrangement in a designated territory and allowed one such dealer to recover from another who had made sales outside his territory.

There are in addition to the cases expressly concerned with territorial restrictions, numerous other decisions which have upheld a wide variety of analogous restraints.

1. ***Customer Restrictions.***

Vertically imposed customer restrictions have long been sanctioned when imposed for a valid business purpose:

> "The common law justification for curtailing the buyer's choice of customers is, once again, the reasonableness of safeguarding the seller's business in the face of effective competition from other brands. The restraint is simply one more species of the traditional covenant not to compete by the purchaser of property.

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* *Id.* at 625. It is interesting to note that recent sales of the ill-fated ocean liner Queen Elizabeth involved a promise not to use the liner to transport passengers, *Wall Street Journal,* April 8, 1968, at 15, col. 2, and the agreement when she was sold for use as a floating university included a covenant that she never again be used as a commercial liner, WCBS-TV New York Television Morning News, Jan. 10, 1972.

** 184 Okla. 410, 87 P.2d 1084 (1939).

*** *Accord,* Delk v. City Nat'l Bank, 85 Okla. 238, 205 P. 753 (1922) (provision in a loan agreement restricting the sale of furnaces to one county is not an unlawful restraint of trade).

**** 112 Kan. 560, 211 P. 631 (1923).

> It is quite true that this application of the rule clashes with the general principle of law favoring the alienability of personal property once it is transferred to the buyer. For that matter, so does the territorial restriction interfere with free alienation. But most courts have resolved the conflict by carving out an exception where the resale restriction is reasonable." Robinson, *Restraints on Trade and the Orderly Marketing of Goods,* 45 Cornell L.Q. 254, 269 (1960).

In 1915 the Supreme Court held that a provision in a contract of sale that the goods were for the buyer's consumption, and not for resale, was not "inherently illegal" so as to preclude the seller from recovering the purchase price.* Since then, two United States Courts of Appeals held that similar covenants restricting the purchaser's right of resale did not contravene the Sherman Act.**

In *Fosburgh,* a contract for the sale of sugar contained a clause that the buyer, a candy manufacturer, would use the sugar for manufacturing purposes only and not for resale. The Court found that the purpose of the provision was to assure equitable distribution of the available supply during a period of severe shortage, and held that this justified the restriction. In *Chicago Sugar* the United States Court of Appeals for the Seventh Circuit upheld the same type of prohibition on resale as a reasonable marketing device because, without it, sugar sold by the refiner to consuming manufacturers could have been resold in competition with the distributing trade.

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* D.R. Wilder Mfg. Co. v. Corn Prods. Refining Co., 236 U.S. 165 (1915).

** Chicago Sugar Co. v. American Sugar Ref. Co., 176 F.2d 1 (7th Cir. 1949), *cert. denied,* 338 U.S. 948 (1950); Fosburgh v. California & Hawaiian Sugar Ref. Co., 291 F. 29 (9th Cir. 1923).

Revlon Products Corp. v. *Bernstein,** involved the use of resale restrictions in connection with a dual system of distribution. The plaintiff, a manufacturer of cosmetics, sold directly to retail stores throughout the country, as well as to jobbers under contracts limiting each to resale to beauty parlors and beauty schools within a specified territory. The defendant, a retailer who knew of these limitations, induced a jobber to sell to him directly. Holding that the agreement was not in restraint of trade and that an action for inducing its breach would lie, the Court stated:

> "It is well recognized that a manufacturer need not go into competition against himself. If he elects to deal with a certain class of customers personally he can not be required to allow those to whom he sells for distribution to compete with him for those customers." 204 Misc. at 81, 119 N.Y.S. 2d at 62.**

That there is no categorical rule against resale restrictions is further illustrated by several decisions, Federal and State, permitting sellers to require their customers to dispose of the purchased goods in export channels only.*** Also, a host of State cases, which arose during the car shortage following World War II, sustained agreements

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* 204 Misc. 80, 119 N.Y.S.2d 60 (Sup. Ct. 1953), *aff'd without opinion,* 285 App. Div. 1139, 142 N.Y.S.2d 364 (1955).

** *See also* Handyspot Co. v. Buegeleisen, 128 Cal. App.2d 191, 274 P.2d 938 (1954).

*** United States v. Newbury Mfg. Co., 36 F. Supp. 602 (D. Mass.), *motion to vacate judgment denied,* 123 F.2d 453 (1st Cir. 1941); P. Lorillard Co. v. Weingarden, 280 F. 238 (W.D.N.Y. 1922); Hicock Mfg. Co. v. Fairley Trading Corp., 117 N.Y.S.2d 874 (Sup. Ct. 1952). *See also* Authors & Newspapers Ass'n v. O'Gorman Co., 147 F. 616 (D. R.I. 1906) (sustaining resale prohibition for one year in connection with sale of books).

preventing purchasers of new cars from reselling them for a limited period of time without first offering them to the dealer at a stipulated price.*

The legality of customer restrictions was presented to the FTC in *Roux Distributing Co.,*** a case in which respondent seller of beauty preparations channeled the distribution of its products through three groups: jobbers, drug wholesalers and beauty supply dealers. Jobbers were confined to selling to the other two groups; drug wholesalers were to cultivate the drug and department store trade; and beauty supply dealers were to obtain business only from beauty salons and the like. In holding that this method of distribution was not proscribed by the antitrust laws, the Commission specifically distinguished *Bausch & Lomb**** because of its price-fixing aspects and cited the sugar cases with approval.****

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* Piazza v. Liberty Motors, Inc., 34 Ala. App. 376, 43 So.2d 134, *aff'd,* 253 Ala. 132, 43 So.2d 136 (1949); Summers v. Adams Motor Co., 34 Ala. App. 319, 39 So.2d 300 (1949); Bay Shore Motors v. Baker, 90 Cal. App.2d 895, 202 P.2d 865 (Super. Ct. 1949); King Motors, Inc. v. Delfino, 136 Conn. 496, 72 A.2d 233 (1950); Schuler v. Dearing Chevrolet Co., 76 Ga. App. 570, 46 S.E.2d 611 (1948); Burnett v. Nolen, 336 Ill. App. 376, 84 N.E.2d 155 (1949); Elizabethtown Lincoln Mercury, Inc. v. Jones, 313 Ky. 321, 231 S.W.2d 42 (1950); Wade & Dunton, Inc. v. Gordon, 144 Me. 49, 64 A.2d 422 (1949); Stanford Motor Co. v. Westman, 151 Neb. 850. 39 N.W.2d 841 (1949); Larson Buick Co. v. Mosca, 79 N.Y.S.2d 654 (Sup. Ct. 1948); Thomas B. Martindale, Inc. v. Gorman, 165 Pa. Super. 612, 70 A.2d 409 (1950); Thomas B. Martindale, Inc. v. Dougherty, 68 Pa. D. & C. 243 (C.P. 1949).

** 55 F.T.C. 1386 (1959).

*** United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944).

**** 55 F.T.C. at 1388.

2. *Restrictions on Lessors and Lessees.**

Restrictions in leases present a particularly powerful analogy. Since they involve the right to use another's property, and not the sale of property, they clearly fall outside *Schwinn's*** purported prohibition of restraints on alienation. Furthermore, restrictions on lessees resemble closely the types of restrictions commonly imposed on trademark licensees and are imposed with similar motives. Restrictions on lessees, as on licensees, are concerned with defining and limiting the terms on which the right to use the property of another will be granted.*** Absent the conditions imposed, the lessor would not be willing to lease his property and the trademark owner would not be willing to license his mark; and neither the lessee nor the licensee would be able to obtain the benefit of using property which is not theirs. The same policy considerations which discourage unreasonable restraints on alienation also militate in favor of arrangements such as licenses or leases which make the use of privately held property more widely available. The Courts have repeatedly upheld reasonable restrictions on lessees of real property.**** A similarly substantial body of case law has sustained reasonable restraints on lessors.*****

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* *See generally* Baum, *Lessor's Covenants Restricting Competition,* 1965 U. Ill. F. 228 (1968).

** United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

*** Cardinal v. Taylor, 362 Mass. 220, 19 N.E.2d 58 (1939).

**** *See, e.g.,* Handfinger v. Stevelaw Realty Corp., 102 N.Y.S.2d 688 (Supp. Ct. 1950); California Bldg. Co. v. Halle, 80 Cal. App.2d 229, 181 P.2d 404 (Dist. Ct. App. 1947). Numerous other decisions upholding a wide variety of restrictions on the use which may be made of leased premises by the lessee are collected in Annot., 148 A.L.R. 583 (1944).

***** *See, e.g.,* Utica Square, Inc. v. Renberg's Inc., 390 P.2d 876 (Okla. 1964); Uptown Food Store, Inc. v. Ginsberg, 255 Iowa 462,

Indeed, restraints upon lessors are essentially a form of exclusive representation. The lessor, agreeing not to compete with the lessee by promising not to engage in the same business or otherwise competing near the leased premises, and by promising not to authorize others to do so, is in substance granting the lessee exclusivity as well as occupancy. Cases sustaining the validity of restrictions on lessors accordingly furnish not only a persuasive analogy for upholding reasonable territorial restraints, but also supply further support for the legality of exclusive representation agreements.

3. *Restrictions on Vendors and Vendees.*

A uniform current of authority has also sustained and enforced reasonable restrictions accompanying sales of real property. For example, in *Lampson Lumber Co.* v. *Caporale,** the Court enforced a restriction imposed in connection with plaintiff's sale of adjoining land to defendant prohibiting defendant from engaging in a competing or conflicting business "during such time as the Grantor or its successors and assigns shall be engaged on the adjoining premises . . . in the . . . lumber or building materials business . . . ." ** In reaching this conclusion the Court observed:

> "[Covenants with a restriction which are made ancillary to a transfer of property] are usually sustained as be-

123 N.W.2d 59 (1963); Vaughan v. General Outdoor Advertising Co., 352 S.W.2d 562 (Ky. 1961); Nagy v. Ginsberg, 282 App. Div. 842, 124 N.Y.S.2d 400 (1953); Berman v. Bergenfield Plaza, Inc., 16 N.J. Super. 520, 85 A.2d 222 (Super. Ct. 1951); Lien v. Northwestern Engineering Co., 73 S.D. 84, 39 N.W.2d 483 (1949). *See also* Goldberg v. Tri-States Theatre Corp., 126 F.2d 26 (8th Cir. 1942).

* 140 Conn. 679, 102 A.2d 875 (1954).

** *Id.* at 681, 102 A.2d at 876.

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> ing reasonable even though they may prevent competition and even though they involve no transfer of good will. . .
>
> "[T]he premises . . . would not have been sold without the restriction . . . [and] the price . . . was affected thereby. [T]he restriction afforded protection to the property and the business of the plaintiff . . . and does not unduly interfere with the interests of the public." *Id.* at 684, 102 A.2d 877.

Other cases have upheld similar restrictions on vendees.* Similarly, reasonable restrictions accompanying the sale of chattels have been repeatedly upheld.** The same rule of reason approach has been applied in cases involving restrictions on vendors of realty.*** As stated by Judge Taft, later Chief Justice, in *United States* v. *Addyston Pipe & Steel Co.,***** at Common Law ". . . covenants in partial restraint of trade are generally upheld as valid when they

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* *See, e.g.,* Boughton v. Socony Mobil Oil Co., 231 Cal. App. 2d 188, 41 Cal. Rptr. 714 (Dist. Ct. App. 1964); Colby v. McLaughlin, 50 Wash.2d 152, 310 P.2d 527 (1957); Carneal v. Kendig, 196 Va. 605, 85 S.E.2d 235 (1955); Staebler-Kempf Oil Co. v. Mac's Auto Mart, Inc., 329 Mich. 351, 45 N.W.2d 316 (1951); Calumet Council Bldg. Corp. v. Standard Oil Co. (Ind.), 167 F.2d 539 (7th Cir. 1948); Dick v. Sears-Roebuck & Co., 115 Conn. 122, 160 A. 432 (1932); Hodge v. Sloan, 107 N.Y. 244, 17 N.E. 335 (1887).

** *See, e.g.,* United States v. Newbury Mfg. Co., 36 F. Supp. 602 (D. Mass.), *motion to vacate judgment denied,* 123 F.2d 453 (1st Cir. 1941); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937); Meyer v. Estes, 164 Mass. 457, 41 N.E. 683 (1895). *See also* Gano v. Delmas, 140 Miss. 323, 105 So. 535 (1925).

*** *See, e.g.,* Hercules Powder Co. v. Continental Can Co., 196 Va. 935, 86 S.E.2d 128 (1955); Bogart v. Caldwell, 66 So. 2d 629 (La. Ct. App. 1953); Raney v. Tompkins, 197 Md. 98, 78 A.2d 183 (1951).

**** 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899).

are agreements by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold . . . ." *

In short, at Common Law the rule of reason invariably governed the legality of a great variety of restraints imposed upon vendors, vendees, lessors and lessees of all sorts of property. As codified in the Restatement of Contracts § 516 (1932), the Common Law clearly recognized that:

> "The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly:
>
> (a) A bargain by the transferor of property or of a business not to compete with the buyer in such a way as to injure the value of the property or business sold;
>
> (b) A bargain by the buyer or lessee of property or of a business not to use it in competition with or to the injury of the seller or lessor;"

B. Territorial Restraints on Sales Under the Federal Antitrust Statutes.

The preceding section has been concerned with Federal and State Court decisions upholding territorial and other types of analogous restraints under the Common Law which, because of the settled doctrine that the Sherman Act codified the substantive law of restraint of trade (see pp. 12-13, *supra*), have continuing precedential value for cases under the Federal antitrust statutes. The cases discussed below involved restrictions accompanying sales of completed goods, which are similar to but broader than the ancillary restraints used in trademark licensing agreements by the soft drink industry.

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* *Id.* at 281.

1. *The Authorities Uniformly Upheld Reasonable Territorial Restraints Under the Sherman Act up to 1949.*

The first reported case involving a territorial restriction in a sale of goods under the Sherman Act was decided in 1903.* A manufacturer sold cement under a contract precluding the buyer from selling outside of Texas. In holding that the provision did not run afoul of the Sherman Act, the Court declared that the manufacturer had no monopoly, that it was surrounded by competing manufacturers, and that the restraint did not have any substantial effect on competition.

> "It left the manufacturers who were competing with the plaintiff for the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed." 125 F. at 595.

Twelve years later the United States Court of Appeals for the Fifth Circuit upheld a similar restriction imposed by an automobile manufacturer on its exclusive agent for certain counties in Texas. Emphasizing the "multitude of other companies from whom purchasers can readily obtain motor cars . . .", and the fact that they, too, utilized this "ordinary instrumentality" of distribution, the Court thought it "obvious" that the challenged arrangement was not inimical to competition.**

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* Phillips v. Iola Portland Cement Co., 125 F. 593 (8th Cir. 1903), *cert. denied,* 192 U.S. 606 (1904).

** Cole Motor Car Co. v. Hurst, 228 F. 280, 284 (5th Cir. 1915), *cert. denied sub nom.* Tillar v. Cole Motor Car Co., 247 U.S. 511 (1918). *See also* Coca-Cola Bottling Co. v. Coca-Cola Co., 269 F. 796 (D. Del. 1920).

Some years later, in *Boro Hall Corp.* v. *General Motors Corp.** the United States Court of Appeals for the Second Circuit held that ancillary geographical limitations were reasonable restraints under the Sherman Act. In this case a Chevrolet dealer sought treble damages because General Motors had forbidden it to establish a used car salesroom beyond its designated "zone of influence" in downtown Brooklyn. Since the market was highly competitive, Judge Augustus Hand saw no reason why the manufacturer "should not be allowed to fix a location for the sale of used cars at a place that did not unduly affect other dealers. . . . To restrict sales of Chevrolet cars to a dealer who would confine its headquarters for dealings in new and used cars and in servicing and selling supplies to some extent is surely reasonable. . . ." ** In denying a petition for rehearing the Second Circuit further pointed out that there was "ample competition in the low-price car field in [the relevant local geographic market]. . . ." ***

After *Boro Hall* was handed down in 1942, the process of adjudicating the legality of territorial restraints ground to a halt until in 1949, despite the absence of any prior judicial declaration of invalidity, the Department of Justice launched a campaign against the practice.

2. *In* White Motor *and Later Cases the Courts Applied a Rule of Reason Analysis.*

Notwithstanding the overwhelming weight of authority sustaining the legality of territorial and customer restraints under the rule of reason, the Department of Justice, beginning in 1949, announced that it viewed such

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* 124 F.2d 822 (2d Cir.), *rehearing denied,* 130 F.2d 196 (2d Cir. 1942), *cert. denied,* 317 U.S. 695 (1943).

** *Id.* at 823, 824.

*** 130 F.2d 196, 197 (2d Cir. 1942).

restrictions as illegal *per se,* relying primarily upon dictum in *United States* v. *Bausch & Lomb Optical Co.** Threatening certain manufacturers with criminal prosecution unless they amended their franchises,** the government was successful in building up a skein of victories in consent decrees, without once having to subject its highly questionable legal theory to the acid test of judicial scrutiny.***

When, however, the government took on White Motor it was met initially not with acquiescence in a consent decree, but instead with vigorous resistance. The government moved for summary judgment and the District Court inexplicably embraced the government's novel doctrine of *per se* illegality lock, stock and barrel,**** summarily enjoining White from restricting the territories in which, or the persons to whom, its distributors and dealers might sell its trucks.***** White appealed to the Supreme Court, and the

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* 321 U.S. 707, 721 (1944); *See* Hearings on H.R. 528, 2688, 6544 Before the Subcom. on Automobile Marketing Legislation of the House Comm. on Interstate and Foreign Commerce, 84th Cong., 1st & 2d Sess. 89, 362 (1956).

** Hearings on H.R. 528, 2688, 6544, *supra* at 89, 362.

*** *See* United States v. Lone Star Cadillac Co., 1963 Trade Cas. ¶ 70,739 (N.D. Tex. 1963); United States v. Sperry Rand Corp., 1962 Trade Cas. ¶ 70,495 (W.D.N.Y. 1962); United States v. Shaw-Walker Co., 1962 Trade Cas. ¶ 70,491 (W.D.N.Y. 1962); United States v. Spring-Air Co., 1962 Trade Cas. ¶ 70,402 (N.D. Ill. 1962); United States v. Dempster Bros., Inc., 1962 Trade Cas. ¶ 70,359 (E.D. Tenn. 1962); United States v. Scott Aviation Corp., 1961 Trade Cas. ¶ 70,148 (W.D.N.Y. 1961); United States v. Hamilton Mfg. Co., 1960 Trade Cas. ¶ 69,882 (E.D. Wis. 1960). For earlier consent decrees, see Handler, *Annual Review of Antitrust Developments,* 15 Record of N.Y.C.B.A. 362, 374 n. 57, 395 (1960).

**** United States v. White Motor Co., 194 F.Supp. 562 (N.D. Ohio 1961), *rev'd,* 372 U.S. 253 (1963).

***** Final Decree, United States v. White Motor Co., Civ. No. 34593 (N.D. Ohio Sept. 5, 1961).

government displayed its disdain by moving to affirm.* Indeed, according to the Department of Justice, the issues were cut and dried, "not present[ing] a substantial question because [they] have all been resolved, against appellant's contentions, by prior decisions of this Court." **

The Supreme Court, however, taking sharp issue with the government's characterization, viewed the case as one of first impression in the Court.*** A five-member majority, led by Justice Douglas, with the concurrence of Justices Harlan, Brennan, Stewart and Goldberg, declined to say that territorial and customer restraints are unlawful *per se.* Before deciding whether such restraints were illegal, the majority believed it necessary to have the benefit of a trial at which the economic pros and cons of the restrictions could be fully explored.

The Court had little trouble in distinguishing *Bausch & Lomb,* "where price fixing was 'an integral part of the whole distribution system' . . . including customer restrictions." **** Similarly, the Court was at pains to distinguish

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* Motion to Affirm of Appellee, White Motor Co. v. United States, 372 U.S. 253 (1963).

** *Id.* at 5.

*** White Motor Co. v. United States, 372 U.S. 253, 261 (1963). *But cf.* Oregon Steam Nav. Co. v. Winsor, 87 U.S. (20 Wall.) 64, 67 (1873). *See also* Tri-Continental Financial Corp. v. Tropical Marine Enterprises, Inc., 265 F.2d 619 (5th Cir. 1959); Hill v. Staples, 85 Ga. 863, 11 S.E. 967 (1890); Dunlop v. Gregory, 10 N.Y. 241 (1851).

**** 372 U.S. at 260, *citing* United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 720 (1944). Although the District Court in *White Motor* enjoined price-fixing arrangements in White's dealer and distributor contracts, the Court was careful to point out that there had been no finding below that White's territorial and customer restraints were "ancillary to the price-fixing scheme . . ." 372 U.S. at 260.

the challenged vertical arrangements from horizontal agreements among competitors to divide markets or apportion customers,* which "are naked restraints of trade with *no purpose* except stifling of competition." ** "A vertical territorial limitation," wrote Justice Douglas,

> "may or may not have that purpose or effect. We do not know enough of the *economic and business stuff out of which these arrangements emerge* to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business . . . and [therefore] within the 'rule of reason.' We need to know more than we do about the *actual impact* of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . . and therefore should be classified as *per se* violations of the Sherman Act." 372 U.S. at 263 (emphasis added).

Quoting at length from Justice Brandeis' classic formulation of the rule of reason in *Chicago Board of Trade,**** the Court in *White Motor* thus held that "the legality of the territorial and customer limitations should be determined only after a trial." ****

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* *E.g.,* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

** 372 U.S. at 263 (emphasis added).

*** Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

**** 372 U.S. at 264. Justice Clark, joined by Chief Justice Warren and Justice Black, dissenting, would have struck down the limitations out of hand. Despite the fact that there had been no trial to determine the actual impact of these arrangements on competition —a trial which the majority considered essential—Justice Clark stated flatly that vertical and horizontal agreements which eliminate

In a separate concurring opinion, Mr. Justice Brennan was more precise as to the specific factors that, in his view, might justify vertically imposed territorial limitations. First, a Court should consider fully whether such arrangements "foster a vigorous inter-brand competition which might otherwise be absent." * Indeed, with specific reference to this justification—the one principally advanced in *White Motor*—Justice Brennan remarked that:

> "Surely it would be significant to the disposition of this case if, as appellant claims, some such arrangement were a prerequisite for effective competition on the part of independent manufacturers of trucks. Whatever relationship such restraints may bear to the ultimate survival of producers like White should be fully

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competition were indistinguishable since "the intended and actual effect is the same as, if not even more destructive than, a price-fixing agreement or any of its *per se* counterparts." *Id.* at 279. Indeed, all of White's arguments and business justifications were swept aside as legally immaterial. "To admit, as does [White], . . . that competition is eliminated under its contracts is, under our cases, to admit a violation of the Sherman Act. No justification, no matter how beneficial, can save it from that interdiction." *Id.* at 281. These words are reminiscent of the literalist view of the statute expressed over sixty years ago by Mr. Justice Peckham, who would have struck down every restraint of trade precisely because section 1 of the Sherman Act says "every." *See* M. Handler, *Antitrust in Perspective* 4-7 (1957).

The glaring weakness of the dissenters' position is quickly revealed when one considers that not one of the cases relied upon by Justice Clark to support his absolutist approach involved vertically imposed territorial arrangements. Rather, they concerned resale price fixing, group boycotts, and tying arrangements, arrangements traditionally proscribed as a matter of law. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Fashion Originators' Guild of America Inc. v. FTC, 312 U.S. 457 (1941); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). In point of fact, the venerable body of case law sustaining customer and territorial limitations under a rule of reason was totally disregarded by the dissenters.

* 372 U.S. at 268.

> explored by the District Court if we are properly to appraise this excuse for resort to these practices." 372 U.S. at 268-69.

Further, in Justice Brennan's opinion, a Court, in judging the reasonableness of territorial restraints, might consider that a manufacturer, starting out in business or marketing a new and risky product, "may find it essential, simply in order to acquire and retain outlets, to guarantee his distributors some degree of territorial insulation as well as exclusive franchises." * Finally, and significantly for present purposes, a Court might also weigh whether territorial limitations are "necessary . . . to ensure that his [the seller's] product will be adequately advertised, promoted and serviced." **

Ironically, the full-blown exploration of the economic justifications for vertical territorial and customer restraints called for by the Court's remand in *White Motor* never materialized because the case was terminated by a consent decree.*** However, when territorial restrictions were again challenged in two subsequent Federal Trade Commission litigations, the United States Courts of Appeals for the Sixth Circuit in *Sandura Co.* v. *FTC***** and the Seventh Circuit in *Snap-On Tools Corp.* v. *FTC******

* 372 U.S. at 269.

** *Id.* This extenuation, which is inextricably tied to the goal of fostering of interbrand competition, is at the very heart of the business justification for the territorial clause and will be discussed in detail at pp. 85-92, *infra* along with the justifications for such arrangements which are peculiar to trademark franchising.

*** United States v. White Motor Co., 1964 Trade Cas. ¶71,195 (N.D. Ohio). While the consent decree prohibited territorial and customer restrictions, this voluntary termination of the case did not resolve the controversial questions raised by the Supreme Court.

**** 339 F.2d 847 (6th Cir. 1964).

***** 321 F.2d. 825 (7th Cir. 1963).

flatly held that vertical allocations of dealer territory are not perniciously anticompetitive or necessarily without redeeming virtue and, therefore, are not violations of the antitrust laws. Both Courts, having the benefit of the type of full-scale evidentiary hearing required by the holding in *White Motor,* applied the traditional rule of reason to the facts of record by weighing the reasonableness of the challenged arrangements in light of their economic justifications and their actual (not implied or imagined) effect on competition.* In each case, the procompetitive effects of the challenged territorial limitations were found to outweigh any anticompetitive consequences and an FTC cease and desist order enjoining such arrangements as unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act was reversed. Quoting from the Hearing Examiner's opinion, the Seventh Circuit noted in *Snap-On:*

> "In the circumstances there is merit in respondent's contention that the maintenance of exclusive territories is indispensable to the successful operation of its business; that 'confusion and chaos' would result if it were forced to abandon the policy. In the absence of the maintenance of a very large corps of salesmen employees, the practice of exclusive territories for its dealers appears to be the only way in which respondent can be assured that sales territories will be ade-

* The Sixth Circuit stated: "[I]t is clear to us that under White Motor the aforesaid bare assertion that Sandura's distributors do not compete with each other will not, standing alone, convict Sandura of violating Section 5 of the F.T.C. Act . . ." 339 F.2d at 849. The Seventh Circuit stated that in *White Motor,* "it was determined that vertical allocations of dealer territory are not per se violations of the Sherman Act. Such a holding necessitates an inquiry into the reasonableness of Snap-On's dealer arrangements and precludes any automatic finding of illegality based merely on a finding that exclusive territories were assigned to Snap-On's dealers." 321 F.2d at 828.

quately worked, that periodic calls will be made on customers, and that satisfactory service will be rendered customers." 321 F.2d at 832.

Sandura and *Snap-On* reaffirmed the rule of reason—the traditional doctrine for determining the legality of ancillary restraints at Common Law and under the Sherman Act—as the decisive test for territorial restrictions. These decisions explicitly rebuffed the government's persistent efforts to equate, as a matter of law, vertically imposed territorial restraints with an illegal *per se* horizontal agreement among competitors to divide markets.*

The failure of the Solicitor General to seek certiorari in *Snap-On* and *Sandura* signaled a marked retreat from his original position that such restraints must be condemned as a matter of law without any factual inquiry into their reasonableness or their actual effect on competition. For if the facts did not count, surely he would have applied for certiorari in both *Snap-On* and *Sandura*. Indeed, in explaining why it decided not to seek review in the *Sandura* case, the Federal Trade Commission issued a press release stating that the Sixth Circuit's decision "is not a

* What is more, as *Sandura* made clear, the mere fact that each dealer accepting the territorial restrictions knows that every other dealer is doing likewise does not destroy the purely vertical nature of the limitation. Indeed, the Court even refused to infer a horizontal arrangement from the fact that the distributors were unwilling to take on the Sandura line or to undertake effective sales promotion work or servicing "without the quid pro quo of closed territories." 339 F.2d at 857. This, of course, does not legitimatize a closed territorial network initiated by dealers acting in concert who then prevail upon their supplier to "impose" it upon them. *Id.* See also White Motor Co. v. United States, 372 U.S. 253, 267 (1963) (Brennan, J., concurring). What it does mean is that such a horizontal genesis must be proved by extrinsic evidence, not presumed just because the business interest of the supplier in establishing an effective marketing organization happens to coincide with the wishes of the dealers. 339 F.2d at 858.

suitable vehicle for obtaining clarification" *—another way of saying that the facts of record were not to the Solicitor General's liking. To confess that a particular case is not "a suitable vehicle" for establishing a rule of *per se* illegality, is, in effect, to admit that no such rule should be established in any case.

3. *The Schwinn Case Is an Aberration and Did Not Decide the Questions At Issue in the Soft Drink Cases.*

In the climate created by *White Motor, Sandura* and *Snap-On,* it appeared that both territorial and customer limitations would continue to be tested under the rule of reason and thus continue to play their vital role in our competitive economy. In 1965 the Chairman of the Federal Trade Commission rejected the application of any rule of *per se* invalidity to territorial restrictions.** Even more significantly, in seeking to overturn the District Court's ruling in *Schwinn,**** the government did *not* urge that the restrictions there involved were unlawful *per se,* but argued only that "[i]n the present case . . . it is sufficient to conclude that Schwinn's alleged justifications are without merit." **** Indeed, during oral argument Justice Black interrupted the government's counsel and inquired: "Am I to understand from your argument that the government

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* 5 Trade Reg. Rep. ¶ 50,264, at 55,584.

** Testimony of Paul Rand Dixon, Hearings on Distribution Problems Affecting Small Business pursuant to S. Res. 40 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 82 (1965).

*** United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *rev'g,* 237 F. Supp. 323 (N.D. Ill. 1965).

**** Jurisdictional Statement of Appellant at 14, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

does not want to win this case on a *per se* argument," to which the Solicitor General replied: "That's correct." *

Schwinn, the nation's second largest manufacturer of bicycles, had revamped its marketing practices to reduce the number of retailers from 15,000 to about 5,500. Schwinn distributed its products primarily through twenty-two wholesale distributors who, in turn, could deal only with retail outlets franchised by Schwinn.** Three distinct marketing methods were utilized: distributors purchased outright for resale to dealers; distributors, acting as agents or consignees, channeled the bicycles to dealers; and distributors, under the so-called "Schwinn Plan," acted as manufacturer's representatives, receiving a commission for obtaining orders, which Schwinn shipped and invoiced directly to dealers.*** Wholesalers were assigned suggested territories and were required to deal only with franchised outlets which in turn could not resell to unfranchised dealers, and Schwinn threatened termination if any distributor violated these restraints.**** It was these customer restrictions which the government challenged.*****

At the trial the government claimed that Schwinn's marketing arrangements were an integral part of a scheme to fix retail prices and were accordingly *per se* unlawful un-

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* *See* Pogue, *Vertical Restrictions on Price, Territory and Customers—The Certainty of Uncertainty,* 29 Ohio St. L.J. 272 (1968).

** 388 U.S. at 369-370.

*** *Id.* at 370.

**** *Id.* at 372.

***** The government also challenged alleged territorial market division between Schwinn distributors, but the only territorial division found was horizontal between four midwestern distributors. United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 335-342 (N.D. Ill. 1965), *rev'd,* 388 U.S. 365 (1967); 1972 Trade Cas. ¶ 73,969 at 92,050 (N.D. Ill. 1972).

der *Bausch & Lomb.** The District Court, finding insufficient evidence of price fixing,** rejected this contention and proceeded to deal with the claimed territorial and customer limitations independently. It found that some of the distributors had agreed among themselves to limit the territories in which they would resell Schwinn bicycles and that such a horizontal agreement was *per se* unlawful, even though the original idea to divide the market had emanated from Schwinn.*** The lower Court, however, did not condemn the limitation in the "Schwinn Plan" transactions or the agency or consignment arrangements.**** It further held that the customer restrictions were justifiable under the rule of reason.*****

Schwinn took no appeal from the finding of illegality with respect to the horizontal territorial restrictions, nor did the government seek review on the price-fixing issue. The only points raised in the government's jurisdictional statement were the correctness of the determinations that Schwinn could lawfully impose territorial restrictions on distributors in nonsale transactions and require distributors to deal only with franchised retailers.******

In an opinion by Mr. Justice Fortas, reflecting the views of five Justices, with Justices Stewart and Harlan concur-

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* United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); *see* Brief for Appellant at 21-22, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

** 237 F. Supp. at 329.

*** *Id.* at 335-342. Since the District Court found that the "division of territory by agreement between the distributors is horizontal in nature," *id.* at 342, it neither found vertically imposed restraints nor did it reach their validity.

**** *Id.* at 343.

***** *Id.*

****** Jurisdictional Statement of Appellant at 2-3, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

ring in part and dissenting in part and Justices Clark and White not participating, the Supreme Court upheld under the rule of reason the territorial and outlet limitations in consignment, agency and "Schwinn Plan" transactions, concluding that their net effect was "to preserve and not to damage competition." * Yet the Court also maintained that the very same restrictions could be unlawful when Schwinn parted with dominion over the goods and sold them outright to the distributors.**

The Court was ambivalent. On one hand restrictions in nonsale transactions were determined to be legal under the rule of reason, yet post-sale restrictions were found to be illegal. According to Justice Fortas, "Once the manufacturer has parted with title . . . his effort thereafter to restrict territory or person to whom the product may be transferred . . . is a *per se* violation of § 1 of the Sherman Act." *** To hold otherwise, he declared, "would violate the ancient rule against restraints on alienation and open

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* 388 U.S. at 381-382.

** Even though the trial Court ruled that only four of 22 distributors horizontally agreed to divide territories and it did not find that the other 18 distributors were involved in territorial allocation, 237 F. Supp. at 339-342; *see* Brief for Appellee at 102, the government argued and the Supreme Court accepted "that it is illogical and inconsistent to forbid territorial limitations on resales by distributors where the distributor owns the goods . . . and, at the same time, to exonerate arrangements which require distributors to confine resales of the goods they have bought to 'franchised' retailers." 388 U.S. at 377-378. Thus the government and the Supreme Court confused vertically imposed customer restrictions and horizontal territorial allocation and the Court was not called upon to rule on vertically imposed territorial restraints such as those found in the soft drink industry. In contrast, the Court did hold that territorial restraints ancillary to nonsale transactions were "a truly vertical arrangement," *id.* at 378, and their legality is to be determined under a rule of reason analysis. *Id.* at 378-380.

*** *Id.* at 382.

the door to exclusivity of outlets and limitation of territory further than prudence permits." *

Nevertheless, Justice Fortas noted that the Supreme Court had been asked by the Government to consider the restrictions challenged in the Supreme Court "in light of the 'rule of reason,' and, on the basis of the voluminous record below," ** and indicated that "we must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable.' " *** Concluding that "it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons to whom an article may be traded after the manufacturer has parted with dominion over it," **** he nonetheless relied on *White Motor*, which had held that vertical restraints may be sheltered if they are not anticompetitive,***** in pointing out that "we are not prepared to introduce the inflexibility which a *per se* rule might bring if it were applied to prohibit all vertical restrictions of territory and all franchising. . . ." ****** Mr. Justice Douglas, who concurred in *Schwinn*, noted soon afterwards that the decision was based on the "economics of the bicycle business" in the context of a record which "elaborately sets forth information as to the total market interaction and interbrand competition, as well as the distribution program and practices" there challenged.*******

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* *Id.* at 380.

** *Id.* at 368.

*** *Id.* at 374.

**** *Id.* at 379.

***** *Id.*

****** *Id.*

******* Albrecht v. Herald Co., 390 U.S. 145, 155-156 n. (1968) (concurring opinion).

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The Court's opinion is confused and generally not consistent. It incorrectly and astonishingly invokes what is stated to be "the ancient rule against restraints on alienation" in holding the territorial restraints unreasonable. Oddly enough, the rule is never stated.* The plain fact is that the Common Law *never* proscribed all restraints on alienation, even of land, and that the "ancient rule" which the Court invokes actually permitted such restraints under a variety of circumstances. As far back as 1879 a unanimous Supreme Court stated:

> " [T]he owner of property has a right to dispose of it with a limited restriction on its use. . . . Repugnant conditions are those which tend to the utter subversion of the estate; such as prohibit entirely the alienation of use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character." **

The rule against restraints on alienation, like its analogue in the ancillary restraint of trade area, balances the interest of an owner to deal with his property as he chooses against the interests served by forbidding the restrictions. In a real sense the two doctrines reflect different aspects

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* The government argued that the customer restrictions were simply "a restraint on alienation, contrary to notions of policy deeply rooted in the common law . . ." Brief for Appellant at 39, 26. Nowhere did the government state the rule and the authority used to support the proposition does not stand for any absolute rule against restraints on alienation. Although Schwinn pointed out that the government cited no case in which customer restrictions were held unlawful under any such Common Law rule it did not inform the Court that no such absolute rule ever existed. Brief for Appellee at 84.

** Cowell v. Springs Co., 100 U.S. 55, 57 (1879).

of the same public policy. In fact, the *Restatement of Contracts* treats the restriction on alienation or use of property as a species of restraint of trade, thus indicating that the two doctrines are complementary, if not identical.* There was never any Common Law rule which absolutely prohibited restraints on alienation.**

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* "A bargain in restraint of trade is illegal if the restraint is unreasonable." *Restatement of Contracts* § 514 (1932). "A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it . . . (d) unreasonably restricts the alienation or use of anything that is a subject of property . . . ." *Id.* § 515.

The courts have applied the rule of reason in situations that might call for the application of the rule against restraints on alienation. For example, in Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1 (7th Cir. 1949), *cert. denied,* 338 U.S. 948 (1950), the Court upheld as reasonable a contract for the sale of sugar which provided that the purchasers would not resell the sugar but would use it solely for their own manufacturing purposes. The authorities relied upon by the Court all concerned restraints under the Sherman Act. *See* Cole Motor Car Co. v. Hurst, 228 F. 280 (5th Cir. 1915), *cert. denied sub nom.* Tillar v. Cole Motor Car Co., 247 U.S. 511 (1918); Revlon Prods. Corp. v. Bernstein, 204 Misc. 80, 119 N.Y.S.2d 60 (Sup. Ct. 1953), *aff'd,* 285 App. Div. 1139, 142 N.Y.S.2d 364 (1955); Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 75 S.C. 378, 55 S.E. 973 (1906); cases collected in Robinson, *Restraints on Trade and the Orderly Marketing of Goods,* 45 Cornell L.Q. 254, 270-271 n.79 (1960).

Gray suggests that the rule against restraints on alienation developed from the basic public policy against only unqualified restraints:

> "[T]he absence of reversionary interest cannot be the real reason for the rule, for that would strike at the root, not only of unqualified conditions against alienation, but of qualified conditions against alienation, and indeed of all conditions on fees whatever . . . . In truth, the rule seems not to allow nor call for any reason except public policy."

J. Gray, *Restraints On The Alienation of Property* § 21 (2d ed. 1895).

** The rule against restraints on alienation was not an absolute, unqualified rule even in the time of Littleton.

> "But if the condition be such, that the feoffee shal not alien to such a one, naming his name, or to any of his heires, or of the

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In addition to relying on a mythical rule against restraints on alienation to support its mechanical approach the *Schwinn* majority created a wholly anomalous distinction between the agency and consignment transactions and Schwinn's outright sale to its distributors. On the one hand, the Court held that when Schwinn retained dominion and risk, competition *required* that its distributors' outlets be limited to franchised dealers, and that restriction tended to preserve rather than hamper competition. But, virtually in the next breath, the Court stated that when the very same distributors take title to the bicycles, the restraints are "so obviously destructive of competition" that they must be condemned as a matter of law. Surely such an exaltation of form over substance brings into serious question the jurisprudential underpinnings of the decision.

For its disregard of the overwhelming precedent sustaining under a rule of reason both territorial and customer restraints, for its almost total reliance on a misapplication of the so-called "ancient rule" against restraints on alienation, for its tortured distinction between agency and con-

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> issues of such a one, &c., or the like, which conditions doe not take away all power of alienation from the feoffee, &c., then such condition is good."

2 E. Coke, *The First Part of the Institutes of the Laws of England* (Coke on Littleton) § 361 (15th ed. 1794).

Nor is it an absolute prohibition today:

> "[A] restraint on the alienation of a legal possessory estate in fee simple . . . is valid if, and only if,
>
> (a) the restraint is a promissory restraint or a forfeiture restraint, and
>
> (b) the restraint is qualified so as to permit alienation to some though not all possible alienees, and
>
> (c) the restraint is reasonable under the circumstances, and
>
> (d) if the restraint is a forfeiture restraint, the requirements of the rule against perpetuities are satisfied."

Restatement of Property § 406 (1944).

signment arrangements, on the one hand, and sale transactions on the other, and for its shortsighted view that intrabrand rather than interbrand competition is the paramount antitrust objective—the majority opinion in *Schwinn* has become one of the most widely criticized antitrust decisions ever handed down by the Supreme Court.*

4. *The Post-Schwinn Cases Continue to Recognize the Rule of Reason.*

Significantly, however, the Court's opinion, employing the language of the "rule of reason," has left enough openings so as to allow the revitalization of the rule in the area of post-sale restraints. And, indeed, as we shall demonstrate below, this is exactly what has taken place in the lower Federal Courts.

Despite its ostensible application of an absolute rule of illegality to all vertical, post-sale restraints, Justice Fortas' opinion is couched in large measure in the traditional language of the rule of reason and cites Justice Brandeis' formulation of the rule of reason in *Chicago Board of*

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* *See, e.g.,* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 389-392 (Stewart, J. dissenting); McLaren, *Marketing Limitations on Independent Distributors and Dealers—Prices, Territories, Customers, and Handling of Competitive Products,* 23 Antitrust Bull. 161, 168 (1968); Pollock, *Distribution in the Wake of Schwinn, White Motor, Et. Al.,* 23 Record of N.Y.C.B.A. 241, 245 (1968); Orrick, *Marketing Restrictions Imposed to Protect the Integrity of 'Franchise' Distribution Systems,* 36 ABA Antitrust L.J. 63, 69-70 (1967); Comegys, Moderator, *Restraints in Distribution: General Motors, Sealy and Schwinn, a Symposium on Ancillary Restrictions,* 36 ABA Antitrust L.J. 84 (1967); Williams, *Distribution and the Sherman Act—The Effects of General Motors, Schwinn and Sealy,* 1967 Duke L.J. 732, 740 (1967); Note, *Territorial Restrictions and Per Se Rules—A Re-evaluation of the Schwinn and Sealy Doctrines,* 70 Mich. L. Rev. 616 (1972); Comment, *The Impact of the Schwinn Case on Territorial Restrictions,* 46 Texas L. Rev. 497, 511 (1968).

*Trade.** For example, he states that in assessing "the practices which are involved in this appeal . . . we are remitted to an appraisal of . . . [their] *market impact.* . . ." ** And, again, "So here we must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry." *** The opinion leaves the door open for business and economic extenuations which may justify territorial, post-sale limitations. Indeed, Justice Fortas was at pains to point out, for example, that Schwinn was neither a newcomer in the bicycle market nor a failing company,**** leaving the distinct impression that such justifications might carry the day for vertically imposed post-sale limitations. Finally, and most critically for present purposes, *Schwinn* did not involve a trademark licensing arrangement where control of quality and uniformity of product are deemed by law to be crucial to the protection of the mark.

Schwinn's equivocal language continues to permit application of the rule of reason in the post-sale area.**** And,

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* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

** 388 U.S. at 373 (emphasis added).

*** *Id.* at 374.

**** *Id.* at 374 (factors which in *White Motor* were said to be relevant to a showing of reasonableness, 372 U.S. at 262-263).

***** In this regard it is noteworthy that in his concurring opinion in Albrecht v. Herald Co., 390 U.S. 145 (1968), Justice Douglas, notwithstanding *Schwinn* (in which he concurred), adhered to his *White Motor* analysis and asserted that the legality of exclusive territorial franchises in the newspaper distribution business would have to be tried as a factual issue and would depend on their impact on competition. *Id.* at 155-156. At least one commentator

indeed, this is precisely what a number of lower Federal Courts have done.

In *Tripoli Co.* v. *Wella Corp.,** the United States Court of Appeals for the Third Circuit, sitting en banc, rejected plaintiff's contentions that *Schwinn* imposes a *per se* rule of illegality with respect to every post-sale restraint on alienation. Wella was a manufacturer of a line of cosmetics, including hair dyes and tints, permanent waves, setting lotions and many similar products. Tripoli had been for over thirty years a wholesale distributor of Wella's beauty and barber supplies to professional beauticians and barbers. However, when Wella learned that Tripoli was engaged not only in wholesale distribution to the trade, but also in retail sales to consumers, Wella cancelled Tripoli's distributorship.

Tripoli thereafter sued Wella alleging that Wella's policy of restricting resale of its professional beauty care products to professional beauticians and barbers, after title to those products passed to a wholesaler, was a *per se* violation of the Sherman Act under the Supreme Court's holding in *Schwinn.*** The Court, Judge Gibbon for the majority, rejected this argument, holding "[i]t is clear that not all restraints in a system of distribution fall into the per se category," citing not only *Schwinn* but also White Motor.*** *Schwinn*, Judge Gibbon wrote,

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has submitted that *Albrecht* heralds a departure from *Schwinn* by the *Schwinn* majority itself. Lundberg, *Schwinn and Beyond: The Survival of the Rule of Reason in Vertically Imposed Customer and Territorial Restrictions,* 30 Mont. L. Rev. 141, 145 (1969).

* 425 F.2d 932 (3d Cir. 1970).

** Tripoli first argued that Wella had instituted an illegal system of resale price maintenance. The Court of Appeals, however, found that Tripoli had abandoned this claim and, therefore, dismissed it summarily.

*** 425 F.2d at 936.

"... does not, as plaintiff proposes, establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer. Rather, *Schwinn* must be read, as must all antitrust cases, in its factual context." 425 F.2d at 936 (emphasis added).

The restraints in *Tripoli* were "of a different order" from those in *Schwinn*:

"The restraint is on a wholesale distributor's reselling products intended for professional application to non-professional retail end users. *This restraint must be tested not by a per se rule but by the standard of reasonableness.* Chicago Board of Trade v. United States, 246 U.S. 231 [citations omitted]. Wella made a convincing demonstration on its motion for summary judgment that in view of the nature of its products, the restraint in the market setting was not only *reasonable* but appropriate in the public interest." 425 F.2d at 936-937 (emphasis added).*

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* Although recognizing that in United States v. Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969), *probable jurisdiction noted,* 405 U.S. 914 (1972), the Court viewed *Schwinn* as imposing a *per se* rule with respect to every post-sale restraint on alienation regardless of market context or purpose, the Third Circuit rejected this reading as too restrictive.

"We are not convinced ... that the Supreme Court intended, for example, that an automobile manufacturer using wholesale intermediate sellers must permit distribution of automobiles through beauty parlors or barber shops rather than through dealers *offering appropriate pre-sale and post-sale services.* Other examples can be imagined. *We do not believe that in the age of 'consumerism' the Supreme Court intended so drastic a reduction of the areas in which a manufacturer may exercise responsibility to the consumer as suggested in Glaxo.*" 425 F.2d at 936 n.3 (emphasis added).

Significantly, the dissenters in *Tripoli* took issue only with the majority's summary disposition of the case and not with its reading of *Schwinn*. Thus, they would have remanded the case for "further factual information" in order to determine, *inter alia*, "whether defendant's admitted restriction of the resale of its products to professional beauticians was either unlawful per se . . . or unreasonable under the test of the 'rule of reason' . . ." * Thus, all eight members of the court recognized that the question of whether or not a post-sale restraint is proscribed by the Sherman Act must be determined on the facts of the particular case. Indeed, the dissent noted that:

> "In some cases such a restriction is deemed illegal per se, and in others *the rule of reason applies, requiring a knowledge of all the surrounding circumstances which reveal the practical effect and meaning of the restriction.*" 425 F.2d at 941 (emphasis supplied).**

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* *Id.* at 940.

** In support of the rule-of-reason approach to vertical, post-sale limitation, the dissent in *Tripoli* cited the post-*Schwinn* decision in Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (2 Cir.) *cert. denied,* 393 U.S. 938 (1968) of the United States Court of Appeals for the Second Circuit. In *Janel,* the Court of Appeals placed a further limitation onto the holding in *Schwinn.* Judge Moore, writing for the Court, held that before invoking the *per se* rule of *Schwinn* there must first be a finding that the seller had been "firm and resolute" in insisting on compliance with a contractual post-sale limitation. *Id.* at 406. The existence of such a contractual clause itself, wrote Judge Moore, "does not necessarily imply a *per se* violation." *Id.*

Attention is drawn also to the opinion of the United States Court of Appeals for the Fifth Circuit in Mississippi Valley Gas Co. v. FPC, 398 F.2d 395 (5th Cir. 1968). There, the Federal Power Commission's issuance of a certificate of public convenience to a supplier of natural gas was challenged on the ground, among others, that the supplier's contracts, limiting the amount of gas its buyers could sell to any one industrial customer, were wrongful.

Although the plaintiff did not ask the Court to decide whether such a post-sale restraint violated the antitrust laws, it did rely

Although in *Tripoli* the Court was careful to note that the plaintiff had not charged that it or any other Wella distributor was confined, in reselling, to a specific territory, the decision is highly significant, first, for its unanimous rejection of an absolute, *per se* approach to post-sale restraints and its application of the rule of reason in this area and, second, for its holding that *Schwinn* is to be limited to "its factual context." *

More recently, in *Carter-Wallace, Inc.* v. *United States,*** the United States Court of Claims, relying on *Tripoli,* also rejected the view that *Schwinn* must be read as applying a *per se* rule of illegality to all post-sale restraints. In *Carter-Wallace,* the plaintiff sued the government to recover "reasonable and entire compensation" for the unauthorized use by the United States of its patents covering, among other drugs, meprobamate. In defense, the government asserted, *inter alia,* that Carter-Wallace had violated the Sherman Act and misused its patent by restricting the manner to which a licensee of meprobamate could put the drug, including limiting the customers to whom the drug could be resold.

In settlement of an antitrust suit, a predecessor of Carter-Wallace and the government had entered into a consent decree in 1962 which required, *inter alia,* that

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solely on *Schwinn* to support its contention. The Fifth Circuit rejected this argument, reasoning that the post-sale limitation was necessary to protect the supplier and its customers "from unreasonably large demands by one customer which could require such a large percentage of the gas carried by [the supplier's] pipeline that other customers would suffer." *Id.* at 398. The Court rested its conclusion on the application of the rule of reason:

> "We view such a provision as probably no restraint on competition and, in any event, not an unreasonable restraint." *Id.*

* 425 F.2d at 936.

** 449 F.2d 1374 (Ct. Cl. 1971).

Carter-Wallace sell meprobamate to any qualified pharmaceutical manufacturer at no more than $20 a pound for unrestricted use and sale by such manufacturer. Carter-Wallace consistently adhered to the decree's mandate. However, it insisted that, when its former purchasers bought meprobamate under their old contracts for a price much less than $20, the purchasers were required to use the drug in dosage form *only,* as the contracts provided. The government contended that under *Schwinn* this arrangement was "illegal or improper on its face, without more and without any further showing." *

The Court of Claims rejected the government's claim along with its attempt to distinguish *Carter-Wallace* from *Tripoli.*

> "The defendant argues here that the specific factors which impelled the Third Circuit to resolve its inquiry in the manufacturer's favor are not present in Carter-Wallace's case, but that contention is considerably off-target; *the point is that the Tripoli court, embarking on a 'rule-of-reason' analysis after and cognizant of Schwinn, thought that the Supreme Court's opinion did not automatically outlaw any and all post-sale restrictions. . . .*
>
> "We conclude, therefore, that *existing case-law does not sustain the Government's defense* that an antitrust violation is made out by what has been presented to us. . . ." 449 F.2d at 1380 (emphasis added).

Refusing to accept the view that *Schwinn,* "understood in [its] setting, stand[s] for [the] rigid and procrustean proposition" that every post-sale restraint is *per se* illegal,**

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* *Id.* at 1379.

** *Id.* at 1379.

the Court concluded that since Carter-Wallace's former purchasers could have easily avoided the use restriction by purchasing their meprobamate at the higher, consent decree-approved price, the restraint was reasonable.

Although the Court in *Carter-Wallace* successfully distinguished *Schwinn,** the decision is important (1) because of its rejection of *Schwinn's per se* rule and (2) because of its refusal to limit the adoption of the rule of reason in *Tripoli* to the particular justifications advanced in that case.

A narrow reading of *Schwinn* also allowed Judge Frankel of the United States District Court for the Southern District of New York to affirm an arbitrator's award enforcing a union agreement prohibiting an ice cream manufacturer from shipping products into the New York metropolitan area from plants outside the area.** A distributor purchased ice cream from plants in Philadelphia, including plaintiff Sealtest's, and distributed the ice cream through its Dari Farms division to chain stores in the New York metropolitan area. The union claimed this violated its contract with Sealtest. Although Sealtest argued that the prohibition applied only to itself and not to independent distributors and that a broader construction would violate the antitrust laws, an arbitrator held in favor of the union. In a declaratory judgment action to determine the validity of the arbitration award, Sealtest asserted that under *Schwinn,* the arbitrator's decision would result in a *per se* violation of the antitrust laws because it would require a territorial restriction on goods sold in Philadelphia to the distributor.*** Judge Frankel nonetheless upheld the ar-

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* *Id.* at 1380.

** National Dairy Prods. Corp. v. Milk Drivers Local 680, 308 F. Supp. 982 (S.D.N.Y. 1970).

*** *Id.* at 985.

bitrator's ruling, distinguishing *Schwinn* as a case involving a conspiracy to eliminate competition, an allegation not made in *National Dairy.* He also differentiated *Schwinn* by noting the union was not attempting to impose restrictions of the *Schwinn* variety since the "unions did not ask . . . that Dari Farms be excluded from selling in the [New York] area. Sealtest is required only to cease delivering products for sale in this Area from its plant in Philadelphia." *

A recent decision of the California District Court of Appeals, applying a state antitrust statute patterned on the Sherman Act,** held that the validity of vertically imposed territorial restrictions ancillary to trademark licenses should be analyzed under the rule of reason. Noting that the "United States Supreme Court has not yet declared that all territorial limitations violate the Sherman Antitrust Act," *** the California Court followed the Supreme Court's

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* *Id.*

** LaFortune v. Ebie, 1972 Trade Cas. ¶ 74,090 (Cal. Dist. Ct. App. 1972), a suit by a Chicken Delight food service franchisee against an adjoining franchisee for delivering chicken to homes in the plaintiff's territory in violation of his exclusive franchise. After plaintiff obtained a judgment for $25,000 for intentional interference with an advantageous business relationship under State law, defendant on appeal claimed for the first time that the contract was illegal under the antitrust laws and therefore unenforceable. Noting that both the California antitrust law (the Cartwright Act) and the Federal Sherman Act have their roots in the Common Law and that cases construing the state statute follow the law as interpreted in the Sherman Act, the Court remanded for a new trial to determine whether territorial restraints were unreasonable. The Court pointed out that "relevant factual distinctions between the food service industry and the bicycle industry in *Schwinn* may justify exclusivity of territory for delivery of product" and that there may be "factors which under the rule of reason could justify restraints of trade that would be unreasonable in the marketing of a standardized manufactured appliance." *Id.* at 94,486.

*** *Id.* at 92,486.

distinction in *Topco** "between horizontal territorial limitations, which it declared to be automatic antitrust violations, and vertical territorial limitations, whose validity remains subject to a rule of reason." **

The lower Federal Court decisions claimed by the Commission staff as construing *Schwinn* "to hold that territorial restrictions are *per se* illegal" *** are either miscited or else contain only short, unauthoritative dicta construing *Schwinn* to that effect.****

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* United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

** *Id.*

*** FTC Statement of March 31, 1972 in Opposition to S. 3040 at A-2.

**** The challenged restrictions were ancillary to price-fixing and *per se* illegal under pre-*Schwinn* law in Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (2d Cir.), *cert. denied,* 393 U.S. 938 (1968), and Interphoto Corp. v. Minota Corp., 295 F. Supp. 711 (S.D.N.Y.), *aff'd on other grounds,* 417 F.2d 621 (2d Cir. 1969). Furthermore, as noted at p. 59 *supra,* the Court in *Janel* noted that the mere existence of a territorial restriction does not necessarily constitute a violation of the Sherman Act; and the Court in *Interphoto* explicitly declined to reach the question of the extent to which *White Motor* survives *Schwinn. Id.* at 720 n. 4. Both Fagan v. Sunbeam Lighting Co., 303 F. Supp. 356 (S.D. Ill. 1969), and Sherman v. Weber Dental Mfg. Co., 285 F. Supp. 114 (E.D. Pa. 1968), involved salesmen or agents, and any suggestion that *Schwinn* created a *per se* rule for sales transactions was dictum. This issue was not even discussed in Chapiewsky v. G. Heilman Brewing Co., 1969 Trade Cas. ¶ 72,712 (W.D. Wis. 1969), and a later opinion in the same case makes it clear that territorial restrictions were intertwined with efforts to maintain resale prices. Chapiewsky v. G. Heilman Brewing Co., 297 F. Supp. 33, 36 (E.D. Wis. 1968). Although *Schwinn* was interpreted as creating an absolute *per se* rule against resale restrictions in United States v. Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969), *probable jurisdiction noted,* 405 U.S. 914 (1972), the Court effectively engaged in a "rule of reason" analysis by its refusal to grant the government's petition for injunctive relief because the evidence did not establish the existence of a "monopoly condition" resulting from the resale restriction. 328 F. Supp. 709, 713 (D.D.C. 1971). No territorial

The narrow interpretation of *Schwinn* given by lower Federal Courts was not disturbed by *United States* v. *Topco Associates, Inc.*,* decided by the Supreme Court late last March. And in any event, the decision did not concern and therefore does not affect the validity of vertically imposed exclusive trademark licensing arrangements such as those found in the soft drink industry.**

The defendant in *Topco* was a cooperative association of 25 small and medium-size supermarket chains. The association was founded in the 1940's to allow these smaller businesses to obtain and sell high quality merchandise under private labels and thus compete more effectively with the large national and regional chains. Small enterprises such as those belonging to the Topco association can compete with the larger chains, which promote their own private brands of merchandise, only by binding together in some way because of the high volume needed to maintain a viable private label program. Topco's members, by distributing Topco private label products on an exclusive territorial basis, were able to achieve significant cost economies in purchasing, transportation, warehousing, promotion and advertising on many products.***

The government attacked the division of marketing territories of Topco-controlled brands as a violation of the Sherman Act. The trial Court found that the only feasible

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restrictions were involved in Hensley Equipment Co. v. Esco Corp., 383 F.2d 252 (5th Cir. 1967).

To the extent that the decisions discussed immediately above are in disagreement about whether *Schwinn* holds that territorial restrictions are still to be governed by the "rule of reason," we will have to wait until the Supreme Court again speaks on this subject.

* 405 U.S. 596 (1972).

** *See* LaFortune v. Ebie, 1972 Trade Cas. ¶ 74,090 (Cal. Dist. Ct. App. 1972).

*** *Id.* at 599 n.3.

method for Topco's members to compete against larger supermarket chains in the private label area was to grant exclusive territories for its products to members through the association, and the anticompetitive effect of territorial restrictions on intra-brand competition was far outweighed by the increased inter-brand competition between Topco members and the national chains.* However, the Supreme Court held that the restraints at issue were imposed horizontally by members of the cooperative association and therefore the members had effected a horizontal division of markets which fell within the ambit of the classic *per se* rule applicable to horizontal restraints.** The Supreme Court's opinion does not discuss vertical restraints, including those imposed by a trademark proprietor without a conspiracy, and does not in any way affect the validity under established law of such arrangements.

The claim of the Commission staff that the Supreme Court's recent decision in *FTC* v. *Sperry & Hutchinson Co.**** reaffirmed the doctrine that "once a manufacturer has sold its products, it cannot under the Sherman Act lawfully restrict the territories in which, or the persons to whom the products may be sold" **** is egregiously misleading. *Sperry & Hutchinson* had nothing to do with the post-sale restraints on goods discussed in *Schwinn,* and the FTC had "explicitly decline[d]" ***** to rely on that decision:

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* United States v. Topco Associates, Inc., 319 F. Supp. 1031, 1038 (N.D. Ill. 1970), *rev'd,* 405 U.S. 596 (1972).

** 405 U.S. at 608-609.

*** 405 U.S. at 233 (1972).

**** FTC Statement of March 31, 1972 in Opposition to S. 3040 at A-1.

***** 405 U.S. at 247-248 n.6.

> ". . . . When the FTC declined to rely on this precedent, however, it did so not to turn to considerations other than those embedded in the antitrust laws, but instead to look for considerations less 'technical' and more deeply rooted in antitrust policy." 405 U.S. at 247-248 n. 6.

The Commission's reasons for eschewing reliance on *Schwinn* are instructive. As the Commission stated in its opinion:

> "[W]e do not believe it appropriate to decide the broad competitive questions presented in this record on the narrow and technical basis of a restraint on alienation. The circumstances here are much different from that [sic] where products are transferred to a dealer for resale. . . . It is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be impairment of competition. Thus, we intend to look at the substance of the allegedly illegal practice rather than to decide the case by application of a technical formula." [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 18,449 at 20,790 (1968), *quoted in* 405 U.S. at 247-248 n. 6.

It is impossible to reconcile the FTC's reasoning in *Sperry & Hutchinson* with its present effort to rely on the same "narrow and technical formula" it had itself previously rejected.

The Commission's claim that the exclusive bottling appointments used in the soft drink industry are part of an illegal horizontal market division is likewise unfounded and flies in the face of the realities of franchising and trademark licensing. The Commission urges that the presence of some bottling facilities, wholly-owned by the

soft-drink concentrate manufacturers, changes the nature of the territorial restraints from vertical to horizontal.* The Commission's analysis here is incomplete. The mere fact that a few subsidiaries of soft drink companies currently operate bottling plants in exclusive territories does not somehow transform the territorial franchise system into a horizontal market division.

Bottling facilities have been acquired by concentrate manufacturers mainly to insure the availability of the soft drinks in question when independent bottlers were about to go out of business. Otherwise the companies' goodwill would have been needlessly dissipated. For example, a substantial portion of bottling plants owned by PepsiCo subsidiaries were purchased when no other buyer could be found. None of the reasons why PepsiCo purchased or established bottling operations supports the conclusion that the territorial franchise system was horizontally imposed.** For a market division arrangement to be horizontal (and therefore subject to *per se* illegality), the closed territorial network must be initiated by franchisees who prevail upon their franchisor to "impose" it on them.*** In the soft drink industry the territorial provisions ancillary to trademark licenses have been granted to thousands of local businessmen over the years as the industry was born and developed and are clearly not the product of any horizontal arrangement among the franchisees.****

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* FTC Statement of March 31, 1972 in Opposition to S. 3040 at A-10.

** *See* Pepsi-Cola Bottlers' Fact Statement at 17, 42-45.

*** United States v. Topco Associates, Inc., 405 U.S. 596, 608-609 (1972); United States v. Sealy, Inc., 388 U.S. 350, 352-354 (1967); White Motor Co. v. United States, 372 U.S. 253, 267 (1967) (Brennan, J., concurring); Sandura Co. v. FTC, 339 F.2d 847, 857-858 (6th Cir. 1964).

**** The cases cited by the Commission staff as creating a rule *per se* illegality of horizontal market division arrangements are all

Territorial restraints in the soft drink industry are ancillary to trademark licensing and have been necessary to effect such licensing agreements since before the turn of the century. Indeed, the purpose of wholly-owned bottling facilities is to increase competition among the concentrate manufacturers and as such are fully legal.

The use of a broad rule of reason approach in determining the legality of vertically imposed territorial restraints ancillary to trademark licensing is not only permitted by existing law, but the basic purpose of the antitrust laws mandates such an approach. Any rigid distinction between sales and nonsale transactions in determining the validity of vertical restrictions, as the Commission claims *Schwinn* requires here, ignores a restraint's actual effects upon competition. There is no basis for concluding that social detriment is less likely when restraints are imposed on goods distributed by an agent or consignee rather than an independent distributor. In the *Schwinn* case itself, the same entities functioned as independent distributors on some transactions and as agents or consignees on others. The deeper paradox in the *Schwinn* decision is that it encourages vertical integration with a correspond-

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inapposite to vertical trademark licensing. In both United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899), and Burke v. Ford, 389 U.S. 320 (1967), there were blatant horizontal territorial allocations designed to suppress competition between competitors. Similarly, in Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), the restrictive territorial agreements were designed "to avoid all competition either among themselves or with others" and the "trade mark provisions were subsidiary and secondary to the central purpose of allocating trade territories." *Id.* at 597-598. Similarly, trademark licensees in the soft drink industry have not prevailed upon the concentrate manufacturers to impose territorial restraints upon them as in United States v. Sealy, Inc., 388 U.S. 350, 352-354 (1967), and Serta Associates, Inc. v. United States, 393 U.S. 534 (1969).

ing loss of independent distributors.* Similarly, small manufacturers which cannot afford the large capital investment and staff to handle their own distribution, are deterred from entering or expanding into a market because of the reluctance of dealers to handle their products without the protection of territorial restrictions. A thorough examination of the soft drink industry will demonstrate the value of the present system of bottling appointments in encouraging the continued existence of independent bottlers and permitting drinks such as PEPSI-COLA to gain a foothold in the market place. Any rigid approach such as the one demanded by the Commission can only hamper Congressional policy of encouraging the economic health of small businessmen and competition at all levels of production.

5. *The FTC and Territorial Restraints.*

The Federal Trade Commission itself has recognized the validity of exclusive representation and territorial restraints and its present position taken in the soft drink cases evidences a wholly new direction. As early as 1916 its conference rulings held that it is not illegal for a manufacturer who has appointed an exclusive representative for a certain territory to refuse to sell to others in that territory.** In 1932 the Commission dismissed without

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* For example, *Schwinn* itself concluded that it would have to integrate forward as the result of the Supreme Court's opinion. *See* United States v. Arnold, Schwinn & Co., 1972 Trade Cas. ¶ 73,969 (N.D. Ill. 1972). See pp. 89-90, *infra*.

** Federal Trade Commisison Conference Rulings, 1 F.T.C. 541 (6); 543(13) and (15); 544(18), (20) and (21); 548(45) (1915-1919). Support by way of analogy may also be found in Roux Distributing Co., 55 F.T.C. 1386 (1959), where the FTC upheld the legality of customer restrictions imposed by a seller of beauty preparations (see discussion under analogues to territorial restraints at pp. 30-33 *supra*.)

opinion a charge that a leading cigar manufacturer had violated §5 of the Federal Trade Commission Act by allocating restricted territories to 46 independent wholesalers and assigning all its remaining markets to 17 wholly-owned wholesalers.*

The Commission has also issued complaints alleging various antitrust violations without complaining of an illegal territorial restriction when the facts clearly showed that territorial restraints had been imposed. For example, in *Kaiser Jeep Corp.***, a consent decree required that the defendant cease and desist from preventing its franchised dealers from stocking the equipment of other companies. No action was brought against the defendant with regard to restrictions of dealers' territories, despite the fact that the contract contained a clause requiring retail dealers to solicit retail sales for defendant's vehicles, parts and accessories only in specific territories.

The Commission's *Carvel* decision sanctioned reasonable restrictions ancillary to a valid trademark license.*** And the Commission's new proposed Trade Regulation Rule with respect to franchising recognizes that territorial restrictions are a protection to the franchisee and, by implication, suggests that franchisees would be well advised to insist upon a promise that the franchisor will not establish another franchisee within his territory or itself compete with the franchise. Under the proposed Rule**** it would be

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* General Cigar Co., 16 F.T.C. 537 (1932).

** 65 F.T.C. 562 (1964).

*** Carvel Corp., 68 F.T.C. 128, 174-180 (1965).

**** FTC Proposed Rule: *Disclosure Requirements and Prohibitions Concerning Franchising,* 36 Fed. Reg. 21607-21608 (Nov. 11, 1971).

". . . an unfair or deceptive act or practice within the meaning of Section 5 of that Act:

(a) To fail to furnish any prospective franchisee with all of the following information, in a clear, permanent, and straight-forward form, at the time when contact is first established between such prospective franchisee and the franchisor or its representative:

. . .

"(21) A statement of the territorial protection granted by the franchisor, in which the franchisor will not establish another franchisee who is permitted to use the same trade name or trademark; in which the franchisor will not establish a company-owned outlet using the same trade name or trademark; and in which the franchisor or its parent will not establish other franchises or company-owned outlets selling or leasing similar products or services under a different trade name or trademark."

Thus, there is precedent in Commission rulings, decisions, decrees and practices with respect to the issuance of complaints sustaining the legality of the very types of business practices which it now seeks to condemn.

III.

The So-Called *Schwinn* Doctrine Could Not Possibly Apply to the Exclusive Rights of Manufacture and Sale Granted in Bottlers' Trademark Licensing Agreements.

Anomalous as the *Schwinn* dictum is, the Congress need not reexamine its precise meaning and effect. The Congress is not being asked to overrule *Schwinn.* It is clear, notwithstanding the confident assertions by the FTC staff, that even the broadest dicta in *Schwinn* are of no application in the FTC's soft drink cases.

The Supreme Court indicated in *Schwinn* that certain restrictions on resale of a product could be illegal as restraints on alienation. The essence of the bottlers' appointments is a trademark licensing agreement and not the simple purchase and sale of a product. The language of the *Schwinn* case in limited to the purchase and sale of a tangible article of property, and its reliance on the concept of a restraint on alienation cannot apply to the licensing of an intangible trade symbol which epitomizes the goodwill of a commercial enterprise.

A. Bottling Appointments Do Not Involve a Restraint on Alienation in the Common Law Sense and Are Not Comparable to the Almost Total Restrictions on Resale Involved in the *Schwinn* Case.

The so-called *Schwinn* doctrine is not authority for the absolute condemnation of provisions in trademark licensing agreements which merely confine bottlers' sales to a given territory in which bottlers are granted the right of exclusive representation.

It has already been noted that the rule against restraints on alienation relied on in *Schwinn* never prohibited all restraints on alienation, even of land. As we have seen, the rule against unreasonable restraints of trade that was

incorporated into the Sherman Act was complementary to the rule against restraints on trade or alienation of property.

Territorial restrictions were never considered total restraints on alienation. Rather, the reasonableness of territorial restrictions unaccompanied by price-fixing or other restraints has traditionally been upheld by the Courts under both the Common Law and the Sherman Act.*

The Court's reliance on the rule against restraints on alienation is explicable only by reference to the facts of that case. The bicycle distributors in *Schwinn,* unlike the bottlers, performed no economic functions other than distributing bicycles and bicycle parts. Their freedom to perform this function was, moreover, virtually non-existent. Schwinn, the manufacturer, required the distributors to confine their sales to customers chosen by Schwinn. The effect of these requirements was to convert the distributors into virtual conduits between Schwinn and retailers acceptable to Schwinn. The distributor was deprived of all freedom either to choose customers or to increase market penetration. Such restrictions forbade the distributors from exercising any vestige of control over the destiny of products ostensibly purchased from Schwinn and deprived them of their ability to function as independent, decision-making business units.

In addition, the restraints in *Schwinn* restricted the availability of the product at the consumer level by ar-

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* *See, e.g.,* Fowle v. Park, 131 U.S. 88 (1889); Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964); Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963); Tri-Continental Finance Corp. v. Tropical Marine Enterprises, Inc., 265 F.2d 619, 625 (5th Cir. 1959); Ford Motor Co. v. Benjamin E. Boone, Inc., 244 F. 335 (9th Cir. 1917); United States v. Newburg Mfg. Co., 36 F. Supp. 602 (D. Mass.), *motion to vacate judgment denied,* 123 F.2d 453 (1st Cir. 1941); Phillips v. Iola Portland Cement Co., 125 F. 593 (8th Cir. 1903), *cert. denied,* 192 U.S. 606 (1964).

bitrarily limiting the number of outlets that could be served by distributors. That was Schwinn's object in imposing restraints on dealers after functioning without them for years.*

Any "restraint" imposed by the territorial restrictions in the bottlers' franchising agreements is far less absolute than the nearly total abolition of economic function involved in the Schwinn distributorship system. Far from serving as a mere conduit between manufacturer and dealers favored by the manufacturer, the bottlers not only fill an important manufacturing function but also perform an important marketing function by deciding how much of what products to bottle and to whom those products should be sold. The so-called restrictions actually leave a bottler free—and indeed encourage him—to sell soft drinks to as many outlets as he wishes and the present system of soft drink bottling appointments by its very nature is designed to expand market coverage.

B. The *Schwinn* Decision Did Not Reach Territorial Restraints Ancillary to Valid Trademark Licenses.

At the heart of a bottling franchise is the license given the franchisee to use the franchisor's trademarks as di-

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* 388 U.S. at 370-371. Significantly, the Government attorneys called the Court's attention to these distinguishing features of Schwinn's distribution practices in their brief to the Supreme Court:

> "Actually, the Schwinn system is quite unlike the plans that have made franchising an important and valuable business trend in recent years. Modern franchising plans have been designed, not to limit the distribution of a well known manufactured product, but to encourage the setting up of new businesses which will be aided by the business advice, trade name and recipe or formula of the franchisor. * * * A decision holding illegal Schwinn's restrictions on the resale of its products will have no effect on most forms of 'franchising'." Brief for Appellant at 20 n.8.

rected by the trademark owner on a product to be made by the franchisee in accordance with the franchisor's quality standards. Realistically, without the trademark license there would not be a franchise agreement. What the franchisor has to sell the bottler is not a trademarked product which the purchaser can then resell unchanged at a price mark-up. It is the right to use the franchisor's trademarks which is of real value and which the bottler is interested in obtaining. Thus, it is the valuable property rights in its trademarks which the franchisor must protect and preserve if it is to remain in business. For these reasons, the important legal considerations here are not merely the ordinary principles of contract law governing the purchase and sale of goods.* Even more important are the fundamental principles of trademark law which require a trademark owner to supervise and control the manner in which his marks are used** and which must be looked to as the standard for gauging the reasonableness of restraints imposed in franchise agreements granting a trademark license.

The decided cases uniformly support the legality of reasonable territorial restraints ancillary to a trademark li-

* Even aside from the quality control considerations mandated by the Lanham Act, the principles of contract law most pertinent to trademark licensing are not those involving the purchase and sale of goods but those involving the purchase and sale of the goodwill of a business. *See* United States v. Paramount Pictures, Inc., 66 F. Supp. 323, 341 (S.D.N.Y. 1946), *decree modified*, 334 U.S. 131 (1948); Coca-Cola Bottling Co. v. Coca-Cola Co., 269 F. 796, 808 (D. Del. 1920). Reasonable territorial restraints in such contracts have, of course, always been lawful.

** Under the Lanham Act, a trademark owner must control the quality of the goods sold under his mark and must supervise its use to avoid the mark's losing its significance as an indication of origin. If he fails to exercise the necessary controls, his mark is subject to loss by abandonment. Lanham Act, 15 U.S.C.A. §1127 (1962).

cense. The right, and indeed the duty, of a trademark owner to control and restrain its licensees in the uses of its trademarks was clearly enunciated in *Denison Mattress Factory* v. *Spring-Air Company*,* where the Court upheld vertical territorial restraints imposed by the owner of a trademark for mattresses on licensed companies using the mark on their own products manufactured in accordance with standards specified by the licensor. In rejecting plaintiff's claim that such restraints violated Section 1 of the Sherman Act, the Court, applying a theory of ancillary restraints,** concluded:

> "In our opinion, Spring-Air not only had a right to license its trademark to exclusive dealers, but also had an affirmative duty to itself and to the public to invoke some kind of control and restraint upon its various licensees to prevent losing its property rights thereunder. It is our opinion that *the provision of the contract with respect to a division of trade territory in the circumstances of this case is not offensive to the antitrust laws. The division of territory was not*

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* 308 F.2d 403 (5th Cir. 1962).

** The Court summarized the rules applicable to ancillary restraints in the following terms, citing Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir. 1961), *cert. denied*, 368 U.S. 931 (1961):

> "If the primary purpose, however disguised, is to stifle competitors and create a monopoly, then the agreement or contract is struck down. However, the cases seem to follow the principle that if the primary purpose of the contract is lawful, e.g., to protect one in the fruits of his labor, and if the arrangement was actuated by or could be explained on the basis of legitimate business justification as opposed to the desire to increase market control through economic leverage, then the court will generally hold any incidental restraint of trade, not harmful to competition of the public, to be lawful." 308 F.2d at 408, cited with approval in Kolene Corp. v. Motor City Metal Treating Inc., 307 F. Supp. 1251, 1271 (E.D. Mich. 1969).

> *the central purpose of the contract.*" 308 F.2d at 409 (emphasis added).*

In reaching this conclusion, the Court noted:

> " . . . a licensor may lose control over a license by not taking appropriate action. If the registrant of a trademark allows or persists in allowing others to misuse his rights, he may, after an appropriate time, find that he has lost his rights through constructive abandonment." 308 F.2d at 409.

Denison recognized that territorial restrictions are important in connection with trademark licenses, not for the purpose of restraining commerce, but primarily for legitimate purposes of trademark protection. As explained in Behrendt, *Trademarks and Monopolies—Historical and Conceptual Foundations:***

> "Unless proper precautions are taken multiple non-exclusive licenses of trademarks may jeopardize the mark since, if several parties are permitted to use the same trademark in the same territory in respect of differently made goods, the mark may cease to identify a specific origin of the goods. This may be obviated by strict quality control through the licensor . . .

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* *Accord, e.g.,* Huber Baking Co. v. Stroehmann Bros. Co., 252 F.2d 945, 956 (2d Cir.), *cert. denied,* 358 U.S. 829 (1958); *see* Coca-Cola Bottling Co. v. Coca-Cola Co., 269 F. 796 (D. Del. 1920); Brosious v. Pepsi-Cola Co., 155 F.2d 99 (3d Cir. 1946); Parkway Baking Co. v. Friehoffer Baking Co., 154 F. Supp. 823, 826 (E.D. Pa. 1957) (dictum); McLaren, *Marketing Limitations of Independent Distributors and Dealers* 13 Antitrust Bull. 161, 170 (1968). *But cf.* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951) ("trademark provisions were subsidiary and secondary to the central purpose of allocating trade territories").

** 51 Trademark Rep. 853, 863 (1961).

> but quality control in case of multiple non-exclusive licensing places, of course, a heavy burden on the organizational handling of the license . . ." Behrendt, *Trademarks and Monopolies—Historical and Conceptual Foundations*, 51 Trademark Rep. 853, 863 (1961).

Territorial restrictions are common in trademark licenses for the simple reason that they:

> ". . . stimulate dealer participation and investment and will induce licensees to concentrate on developing their sales territories. In a trademark context territorial limitations serve the additional purpose of aiding the licensor in tracing customer complaints to a particular licensee." Eckmann, *Antitrust Problems in Trademark Franchising,* 55 Trademark Rep. 835, 851 (1965).

To further these legitimate goals, *Denison* established that a trademark licensor may do everything reasonably incident to control over his licensee, including designation of territories. As Callmann has pointed out in his treatise *Unfair Competition, Trademarks and Monopolies*:*

> "The suggestion that limitations of the license agreement, territorial or otherwise, should be valid if they are ancillary to the licensing agreement is sound. Just as the licensor is constrained to do nothing that would 'derogate from his own grant,' or deprive the licensee of the benefit of the contract, the licensee should not be allowed to do anything that would derogate from the licensor's right to exploit his patent or trademark in a normal and ordinary manner. The licensor's domain should be as far-reaching as the legal power

* 1R. Callman, *Unfair Competition, Trademarks and Monopolies 465-466* (3d ed. 1967).

of his patent or trademark and within that domain he may appoint others to act for him. . . .

"[T]he minimal intrabrand competition which might be restrained [is] far outweighed by the much more sizable promotion of interbrand competition."

The Federal Trade Commission itself has cited *Denison* with approval and reaffirmed and applied the ancillary restraints doctrine in upholding restrictive clauses in ice cream franchising agreements.* Explaining the principles of trademark law which bear on the reasonableness of restraints imposed on a trademark license, Commissioner Jones stated for the Commission:

". . . [U]nder present trademark law, a trademark owner, in order to retain his right to his mark, must, when he elects to license others to use his mark, retain sufficient control over his licensees' dealings in the end product to insure that they will apply the mark to either the same product or to one of substantially the same quality with which the public in the past has associated the product . . . .

"[T]he cases also make it clear that a licensor must inspect its licensee's operation in order to maintain the control required by the trademark law if the mark is not to be treated as abandoned." 68 F.T.C. at 175.

In short, "trademarks may be licensed but only on condition that the trademark owner retains control over the licensee's use of the trademark . . . ." **

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* Carvel Corp., 68 F.T.C. 128, 175 (1965). While territorial limitations were not among the restrictions at issue, the principles enunciated in the Commission's *Carvel* decision with respect to trademark licenses in franchise agreements are equally applicable to exclusive territorial provisions.

** *Id.*

Whether the degree and means of control over the trademark licensee amounts to a reasonable restraint under the antitrust laws "turns on whether their primary purpose was to protect the licensor's trademarks or to restrain trade." * As the Commission pointed out in *Carvel:*

> ". . . not all covenants in restraint of trade are void. It is clear from *Timken* that a conventional restraint of trade may be permitted where the covenant embodying it is merely 'ancillary' to the principal purpose of a lawful contract. See also *U.S.* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (6th Cir. 1898).
>
> "Subsequent cases involving this question of the validity under the antitrust laws of restrictions imposed on trademark licensees have applied this same 'ancillary-primary' test and have sustained the validity of restrictions very similar to those involved in the Carvel agreement. [citing *Denison Mattress Factory* v. *Spring-Air Company,* 308 F.2d 403 (5th Cir. 1962) and other cases.]" 68 F.T.C. at 176-177.

Applying these principles, the Commission concluded that the restrictions imposed on Carvel's licensees** were "reasonably related to Carvel's right—and obligation—to control the quality of its trademark product and the identity and image of its trade name." ***

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* *Id.* at 176.

** Under the Carvel franchise agreements, licensees were required to purchase ingredients and other items used in manufacturing and dispensing Carvel products from Carvel or sources designated by Carvel.

*** 68 F.T.C. at 177; *accord,* Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), *cert. dismissed,* 381 U.S. 125 (1965). In its recent decision in Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972), the Ninth Circuit, although rejecting the notion that a trademark owner's duty to the

The degree of control that a licensor is required to exercise over a licensee is such that if any language in *Schwinn* is applicable to trademark licensing it is not the dicta concerning sale transactions, but rather the holding with respect to consignees and agents.

Part of the bottler's consideration for the purchase of concentrate is the acceptance of certain conditions regarding its resale and use; only when those conditions have been satisfied has the bottler perfected its rights. If the bottler fails to observe these conditions, the law recognizes that the licensor is entitled to injunctive relief to prevent further sales of the non-conforming product, including stocks already in the licensee's possession* and the licensor may obtain an accounting for non-conforming goods sold in the past.**

The bottler never acquires an absolute right to trademarked products, but rights that are conditional on performance of a contract. The licensor exercises a control that exists as long as the products remain in the bottler's possession.

This right of control is comparable to that of a bailor or consignor who delivers physical property to a bailee for limited purposes, such as resale, and is entitled to revoke the bailment if the bailee exceeds the scope of the bailment. In such a case it is axiomatic that dominion remains in the

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public to assure the quality of the trademarked product justifies purchase requirements in every case, recognized that purchase requirements or similar restrictions would be legal when they were the only effective means of fulfilling that duty.

* *E.g.*, Franchised Stores of New York, Inc. v. Winter, 394 F.2d 664 (2d Cir. 1968).

** Joseph Bancroft & Sons Co. v. Shelly Knitting Mills, Inc., 212 F. Supp. 715, 741 (E.D. Pa. 1962).

bailor even though immediate possession and some rights of disposition have been vested in the bailee.

The analogy between trademark licensing and bailments, consignments or similar arrangements has been recognized in the cases. In *Cardinal* v. *Taylor,** trademark licensing was analyzed in terms of a loan from licensor to licensee and in *Denison Mattress Factory* v. *Spring-Air Co.,*** the Court stated:

> "A trademark owner may extend the territory in which he has the right to exclusive use of his trademark, either by expanding his own operations, or he may introduce his trademark and create a demand for his variety of goods in new territory, by licenses subject to his control. . . . *Of course, the licensee acquires only the right to a limited use of the trademark and the control, right and title to the product* remains in the licensor. . . ." 308 F.2d at 409 (emphasis added; citations omitted).***

The same analogy has been drawn in the field of copyright licensing where the copyright represents a judically protected embodiment of an artist's creation much as a trademark represents a judicially protected embodiment of the goodwill of a business. As stated by Justice Roberts in a dissenting opinion:****

> "All the Copyright Act does is to create a form of property in the literary or artistic production of the

* 362 Mass. 220, 19 N.E. 2d 58 (1939).

** 308 F.2d 403 (5th Cir. 1962).

*** *See also* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 193-95 (2d Cir. 1970) (dissenting opinion) *cert. denied* 401 U.S. 923 (1971).

**** Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

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> author or artist. The Act attaches to the product of his brain certain attributes of property. One of these is the right of exclusive use similar to that attaching to physical property; another is the right to sell the product with consequent exclusive enjoyment in the vendee; *another is the right to license others to use the product as one might lease or bail real or personal property. . . .*" 306 U.S. at 236 (emphasis added), *quoted in United States* v. *Chicago Tribune-New York News Syn., Inc.,* 309 F. Supp. 1301, 1304 (S.D.N.Y. 1970).

An instructive analogy supporting this distinction between post-sale territorial restraints and ancillary territorial restraints accompanying a licensing agreement can be found in the field of patent law. Notwithstanding the unlawfulness of post-sale restrictions on patented goods,* it has been recognized through the history of the patent laws that a patentee may limit the territory in which his licensee can make or sell the patented product.** Indeed, it is well-settled that a patentee may legally restrict his licensee to a particular field and exclude him from others.***

* United States v. General Electric Co., 272 U.S. 476, 489 (1926).

** Patent Act § 261, 35 U.S.C. § 261; Keeler v. Standard Folding Bed Co., 157 U.S. 659 (1895); Adams v. Burks, 84 U.S. (17 Wall.) 453, 456 (1873); Brownell v. Ketcham Wire & Mfg. Co., 211 F.2d 121, 128 (9th Cir. 1954); Becton, Dickinson & Co. v. Eisele & Co., 86 F.2d 267 (6th Cir. 1936), *cert. denied,* 300 U.S. 667 (1937).

*** General Talking Pictures Corp. v. Western Electric Co., 305 U.S. 124, 126-27 (1938). *Accord, e.g.,* Bela Seating Co. v. Poloron Products, Inc., 438 F.2d 733 (7th Cir.), *cert. denied,* 403 U.S. 922 (1971); Barr Rubber Products Co. v. Sun Rubber Co., 277 F. Supp. 484, 506 (S.D.N.Y. 1967). *See also* United States v. Chicago Tribune-New York News Syn., Inc., 309 F. Supp. 1301 (S.D.N.Y. 1970) (validity of a territorial restraint in a copyright license is judged under the rule of reason).

The *Schwinn* case held that restraints imposed on consignees or agents who are expected to resell goods must be tested under the rule of reason. No harsher rule should be applied to trademark licensing where the trademark owner has an even greater interest in the integrity and reputation of its franchisees. Improper display of a franchisor's trademarks, or their use on a non-standard or low quality product by any of its licensees, is a threat to the validity and exclusivity of the marks. If bottlers overextend themselves and become unable to supply a quality product to the area surrounding their bottling plants or in which their trucks operate the franchisor's valuable goodwill may be impaired. Territoriality is inherent in the law of trademarks. Reasonable territorial limitations are thus not merely a permissible means of operation; they are a necessity to adequate protection of the franchisor's property rights in its valuable trademarks.

For these reasons, reasonable territorial restrictions in trademark licenses have been sustained against antitrust attack, as have similar provisions in patent and copyright licenses. When considered in terms of the rights and obligations of trademark licensors and licensees, the holding of *Schwinn* tends only to confirm the validity of these decisions.

C. Business Considerations Demonstrating the Reasonableness of Territorial Restraints in Franchise Agreements.

Economists and marketing experts list economic necessity first and foremost among the considerations demonstrating the reasonableness, and therefore the lawfulness, of territorial restraints. Territorial restrictions have been described as an inherent necessity for the very survival of a franchising operation.* Without some assurance against

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* *See, e.g.*, Warren, *Economics of Closed-Territory Distribution*, 2 Antitrust Law & Eco. Rev. 111, 117 (1969).

intrabrand competition by another franchisee selling the same trademarked product in the same sales territory the franchising system will be entirely defeated.*

The Federal Trade Commission itself, in a statement submitted to the Small Business Administration recognized that:

> "The essence of any franchise system is the establishment of quasi-independent franchisees subject to various controls respecting his business operations, the nature of which depends in part on the philosophy of the franchisor and on the nature of the product and services franchised. However, some form of control over the franchisee is an essential ingredient of the franchise system." Quoted in Zeidman, *Antitrust Aspects of Franchising*, 45 Mich. St. B. J. 27, 30-31 (May 1966).

Indeed, a recent publication of the Commission urges potential investors in franchised businesses to be sure to get an exclusive territory.** Implicit in this advice is the

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* The economic consequences of such a defeat would be immense. The franchisor with his followers—450,000 strong, has attained the traditional positions of big business. Franchising now accounts for at least $65,000,000,000 worth of sales each year. This is 10% of the gross national product of the United States. *See* Zeidman, *Antitrust Aspect of Franchising*, 45 Mich. St.B.J. 27 (May 1966); Hewitt, *Termination of Dealer Franchises and the Code-Mixing Classified and Coordinated Uncertainty with Conflict*, 22 Bus. Lawyer 1075 (1967).

** Advice for Persons Who are Considering An Investment in a Franchise Business, F.T.C. Consumer Bulletin No. 4 (1970) at 7:

> "*WHAT ABOUT THE FRANCHISE TERRITORY?*
>
> The franchise territory is a critical factor to consider in evaluating a prospective venture. Following are some questions which may help you to assess this aspect of the franchise.
>
> What specific territory is being offered? Is it clearly defined? What is its potential? . . . . What competition would you meet in marketing the commodity in the designated territory today?

recognition that what the franchisor transfers to the franchisee, and what the franchisee actually invests in, is the goodwill of a particular product. This same goodwill, established through continuously high quality and symbolized by a nationally recognized trademark, is one of the major factors which stimulates the consumer to buy.

Absent territorial limitation, there is nothing to prevent a "free rider" who has saved money on all of the market development work necessary to sell the product and therefore can underprice his competitors from taking advantage of the sales efforts and services provided by his intrabrand rivals. Under these circumstances, a franchisee has little motivation to promote his franchisor's product actively.

> "There is good reason to believe that the promise of freedom from intrabrand competition is in fact . . . essential to induce the dealer to promote the product in certain ways. Without such a promise of closed-territory distribution, the dealer is less assured that some of these forms of promotion will bring adequate returns." Warren, *Economics of Closed-Territory Distribution*, 2 Antitrust L. & Eco. Rev. 111, 116 (1969).

Where intrabrand competition is not controlled, franchisees will fight for the largest accounts, leaving smaller customers unserviced, and the net result will be to discourage full exploitation of the market for the franchisor's product.* Territorial exclusivity allows the franchisee to concentrate on maximum exploitation of his sales area by

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How about five years from now? . . . . *What assurance do you have that the territory you select is an exclusive territory? In other words, would you be protected from the possibility of the franchisor selling additional franchises within the territory at a later date?* (emphasis added)

* *See* Handler, *Statement Before the Small Business Administration,* 11 Antitrust Bull. 417, 427-432 (1966).

furnishing needed assurance that money and sales effort (including advertising, promotion, service, information, goodwill, and training of personnel) can be recaptured through sales.* Competition by two or more franchisees competing for the same large account might reduce the total sales effort directed toward some of the smaller, less profitable accounts. Consequently, it might reduce the supplier's sales to a lower level than he would have enjoyed if his dealers had promoted his product intensively in their own territories. Closed-territory distribution and trademark licensing as in the soft drink industry eliminates duplication of sales effort.

In addition, the customer is more likely to receive good service when one franchisee is responsible, and eager to retain his clientele, and the likelihood of selling defective products is lessened when a franchisee knows that he will be held responsible. Thus the net effect of closed-territories in franchising is to provide the most efficient method of distribution, resulting in beneficial cost reduction which, in a highly competitive market, will ultimately inure to the consumer.**

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* According to Professor Lee Preston, who has developed a spatial model to demonstrate the effect of intrabrand competition on the size of the supplier's market that is exploited, closed-territory distribution affords the dealer a greater return per incremental sale and hence provides him with an inducement to contact smaller customers, resulting in an increase in the size of the market supplied. Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 Law & Contemp. Prob. 506 (1965).

** Studies of the soft drink industry show that there is intense and growing interbrand competition between companies. Moreover, competition has increased since the advent of the contract canner and the influx of private label brand products. *See, e.g.*, Corplan Associates, *A Study of the Soft Drink Industry, 1965-1970*, 83 (1968); Shih and Shih, *American Soft Drink Industry & the Carbonated Market* (1965).

These and the other business justifications for closed territories far outweigh any anticompetitive effects, since "[c]losed-territory distribution itself can never rationally be used to increase aggregate monopoly power. . . ."* Indeed, closed-territorial franchising actually promotes competition by offering ease of entry into the market, economic viability for small businesses and an alternative to vertical integration. It affords a means whereby a non-dominant firm can attract effective distributors, potential competitors can enter new markets, failing manufacturers can strengthen their competitive positions, and service can be adequately furnished in industries where it is a critical element of marketing. It facilitates the pooling of the capital and experience of a large organization with the zeal and the know-how of local operation.** While providing the advantages of large size, franchising allows the small businessman to retain ownership rather than employee status.

The Supreme Court's *Schwinn* decision has provided a powerful impetus toward vertical integration.*** In fact, Schwinn has itself vertically integrated so that independent distributors were replaced by an extension of the

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* Warren, *Economics of Closed Territory Distribution,* 2 Antitrust L. & Eco. Rev. 111, 119 (1969); Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Decision,* 75 Yale L.J. 373, 402 (1966).

** *See* Rowe, *The Significance of Franchising in 1967,* 12 Antitrust Bull. 1167 (1967).

*** *See, e.g.,* Stachen, *Effect of Schwinn Bike on Territorial and Customer Restraints and Consignments: Will It Force Manufacturers Into Forward Integration?,* 2 Conn. L. Rev. 383, 397 (1970); Pollack, *Distribution in the Wake of Schwinn, White Motor, Et Al.,* 23 Record of N.Y. C.B.A. 1246 (1968); Keck, *Alternative Distribution Techniques—Franchising, Consignment, Agency, and Licensing,* 13 Antitrust Bull. 177, 189 (1968).

company's own distribution facilities* a result which is clearly contrary to the purposes of antitrust.**

For many manufacturers territorial franchising is the only economically practicable alternative to vertical integration.*** As Commissioner McIntyre pointed out in a recent address:****

> "Sometimes there is the need to 'bunch' sales in a sufficiently small number of dealers so that all of them together can afford the cost of maintaining the fairly elaborate service facilities necessary to the successful marketing of certain products. In some such situations courts have approved the agreements. The test then,

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* Keck, *The Schwinn Case,* 23 Bus. Laywer 669, 686-687 (1968).

** Interestingly, Justice Fortas, the author of the *Schwinn* decision, commented in 1960:

> " . . . small—or smaller business—may have reason to fear that the Government's current enforcement emphasis may inadvertently have the effect of insulating our giant companies from *real competition* . . . .
>
> "I propose that we remember with something more than antiquarian interest, the views of Brandeis; and that in the pursuit of our love for competition by antitrust enforcement, we heed the warning of Oscar Wilde: For each man kills the thing he loves." Fortas, *The Grievances of the Small Businessman—A Bill of Particulars,* 16 ABA Antitrust Section 33, 36-37 (1960) (emphasis added).

Similar concern was expressed by Commissioner Jones in an address made in 1968 in which she warned that attacks on franchisors for exercising too much control over franchisees may encourage suppliers to abandon franchising and integrate forward to the detriment of small business. P.L.I. *Conference on Business and Legal Problems of the Franchise,* held in New York City Sept. 28, 1968.

*** *See, e.g.,* Zeidman, *Antitrust Aspects of Franchising,* 45 Mich. St. B. J. 27 (May 1966).

****FTC Press Release, "The Franchised Dealer," Address to Members of the National Automobile Dealers Association (October 12, 1971).

> is one of reasonableness or practical necessity: if the restraint is necessary to the success of the system, it may not be struck down. . ." (p. 11)

As shown above, the benefits of franchising are not limited to the franchisee. The consumer benefits by receiving quality, service, and prices which can compete with those of chain or vertically integrated operations. The manufacturer derives the benefit of the franchisee's peculiar knowledge of local conditions, expertise in servicing the product and local goodwill. The franchisee also benefits, by obtaining the franchisor's capital, managerial acumen, modern techniques, economy of large scale purchasing, advertising and prestige.

In sum, franchising has many social and business advantages over alternative methods of marketing.* Where, as in the soft drink industry, franchises include a license to use the franchisor's valuable trademarks, there are additional justifications which furnish even stronger reasons for permitting territorial restraints.** Since the product is completed, not by the trademark owner (as in *Schwinn*), but by his licensee, quality control is not merely an important but a vital consideration. It is critical in protecting the public "image" or "identity" developed by the franchisor.*** A trademark license, particularly for a

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* *See* Comment, *Vertical Territorial Restraints and the Per Se Concept,* 18 Buffalo L. Rev. 153, 165-166 (1969).

** The economic benefits of employing territorial restraints ancillary to trademark licensing in the soft drink industry are more fully discussed in the Pepsi-Cola Bottlers' Fact Statement.

*** *See* Pollock, *Antitrust Problems in Franchising,* 15 N.Y.L. Forum 106, 107 (1969); Panel Discussion—Fels Statement at P.L.I. Conference in New York City, on *Business and Legal Problems of the Franchise, Antitrust Problems in Franchising,* September 28, 1968. "In a trademark context territorial limitations serve the

food product, calls for continuing quality control to protect the consuming public, as well as the licensor's trademark rights and, as such, requires a much higher degree of quality control than a mere sale of completed goods. Thus, as shown by the decisions discussed in the preceding section, the Courts and the Commission have recognized that a trademark licensing arrangement serves as a justification for reasonable trade restrictions and the Courts have clearly held that the right, indeed the duty, of a trademark owner to control the use of its trademark warrants the imposition of territorial restraints in the trademark license agreement.*

CONCLUSION

We have shown in this memorandum that exclusive representation arrangements and exclusive territorial provisions in trademark licensing agreements are clearly valid under existing law. We are not asking Congress to change this existing body of law. On the contrary, it is only because the FTC seeks to overturn these long-settled legal principles that it has become necessary to seek their legislative reaffirmation.** Legislation is needed to avoid wanton

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additional purpose of aiding the licensor in tracing customer complaints to a particular licensee." Eckmann, *Antitrust Problems in Trademark Franchising,* 55 Trademark Rep. 835, 851 (1965).

* LeBlanc, *Antitrust Ramifications of Trademark Licensing and Franchising,* 53 Trademark Rep. 519, 537-538 (1963).

** The etymology of the word *franchise* reveals that the term has always implied territoriality and exclusivity. IV Oxford English Dictionary 510 (Murray ed. 1933) gives as one definition of a franchise: "The district over which the privilege of a corporation or an individual extends; a territory, domain." *Accord,* Oxford Dictionary of English Etymology 374 (Onions ed. 1966). Blackstone's Commentaries point out that "the same identical franchise, that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant." Vol. I, Book II *37.

destruction of the soft drink industry in this country by the application of principles which are both legally and economically unsound.

The bottlers have come to Congress in compliance with the suggestion of the Supreme Court in its recent *Topco** decision that Congress be consulted and legislation enacted affecting specific trade regulation problems. Pointing out that "courts are of limited utility in examining difficult economic problems," ** the Supreme Court invited Congress to resolve such antitrust controversies.*** Concurring in the result, Mr. Justice Blackmun suggested that Congress should afford legislative relief so that competition be aided,**** and Chief Justice Burger, dissenting, strongly urged Congressional intervention in antitrust controversies such as this one.*****

Both this memorandum and the Pepsi-Cola Bottlers' Fact Statement clearly demonstrate that without exclusive bottling appointments there would have been no soft drink industry as we know it today and that the massive changes in the industry's structure demanded by the Federal Trade Commission will adversely affect competition as well as the continued existence of numerous viable small businesses. It is incumbent on Congress to insure that its policy of promoting competition and protecting small businessmen is carried out, particularly if the Courts are unable or unwilling to do so.

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* United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

** *Id.* at 609.

*** *Id.* at 609-10 n. 10. *See also* Flood v. Kuhn, 40 U.S.L.W. 4747 (June 19, 1972).

**** 405 U.S. at 612-613.

***** *Id.* at 624.

Consonant with the Supreme Court's suggestion in *Topco,* Congress should affirm existing law which has proven its soundness through long years of application, and by so doing remove the need for protracted and wasteful litigation before the Commission and in the Courts.

Respectfully submitted,

MILTON HANDLER,
Attorney for Respondent,
PepsiCo, Inc.

Of Counsel:

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

Dated: August 4, 1972

[From the New York Times, Aug. 3, 1972]

Coca-Cola Company Reports Record Earnings

(By Clare M. Reckert)

The Coca-Cola Company had the highest earnings for any quarter or any half year in its history in the three and six months ended June 30, according to the semi-annual report issued yesterday from the company's Atlanta headquarters.

Second-quarter net earnings rose 14.7 per cent to $55,825,409, or 94 cents a share, from $48,660,439, or 82 cents a share, for the June quarter of 1971.

Net profit for the first half of this year was $91,052,816, or $1.53 a share. This represented a gain of 14.4 percent from the $79,580,760, or $1.34 a share earned in the first six months of last year.

Provision for income taxes for the second quarter was $49,658,000 up from $44,702,000 a year ago. For the six months the provision totaled $83,662,000 up from $76,691,000, respectively.

The company, the nation's largest factor in the soft-drink field, producing syrups and concentrates under the Coca-Cola, Fanta, Sprite, Fresca and Tab brand names, does not issue quarterly sales figures.

Directors will meet for dividend action on Monday.

The Coca-Cola Bottlers' Association,
Atlanta, Ga., September 18, 1972.

Hon. Philip A. Hart,
The U.S. Senate,
Washington, D.C.

Dear Sir: The Coca-Cola Bottlers' Association (the "Association") wishes to submit this statement in connection with the current Hearings on S. 3133 and similar legislation being considered by the Antitrust and Monopoly Subcommittee of the Committee on the Judiciary. The Association endorses and urges the passage of S. 3133 as legislation in the public interest and in the best interest of its members and of all other soft drink bottlers in the United States.

The Coca-Cola Bottlers' Association was originally formed in 1914, and throughout its existence it has promoted and protected the common business interests of Bottlers of Coca-Cola. Currently, the Association's membership includes more than 98% of Coca-Cola Bottlers in the United States. The Association is managed by a Board of Governors consisting of 23 regional representatives elected by the membership with each member, regardless of size, having an equal vote.

We wish particularly to respond to two suggestions made by certain witnesses before your Committee, namely, that the Association is dominated by The Coca-Cola Company and that there is a sharp division among Coca-Cola Bottlers as to the desirability of legislation such as S. 3133.

Coca-Cola Bottlers are independent businessmen who have been free from many of the abuses and controls practiced by franchisors against franchisees in other industries. Except for the controls required by law to insure that uniform, high standards of quality are maintained for a trademarked food product by all of the licensees of the trademark, Coca-Cola Bottlers manage their own businesses as they see fit. Although there are a number of factors which have contributed to this independence, certainly one of the most important has been the fact that the Bottlers won their independence in court in litigation against The Coca-Cola Company in 1920, when The Coca-Cola Company sought to terminate the contractual rights of all Bottlers.

Over the years since this decision, there has generally been cooperation and accord between Coca-Cola Bottlers and The Coca-Cola Company in seeking the promotion of the products in which they share a common interest. Such cooperation, however, has been one of mutual respect, rather than one arising from dominance, with the tacit recognition that the Bottlers of Coca-Cola would be able and willing to defend their rights from unwarranted encroachment, if such action became necessary.

It is in this tradition of independence that the Association supports S. 3133. It does so because its members consider the legislation to be in the public interest. The present territorial system has produced intensive interbrand competition on the local level with the resulting benefits to the public of low prices, multiple product choice and universal availability. Many of the beneficial results of this

system will be lost if the industry is restructured as the Federal Trade Commission staff proposes. Further, a territorial system is in our judgment essential to the continued use to any significant extent of the more economical returnable bottle for soft drinks. Finally, unless the territorial system is preserved, many of the smaller Bottlers of Coca-Cola are convinced that they will be eliminated as viable business entities. While the Association is pleased that The Coca-Cola Company has also endorsed S. 3133, the Bottlers of Coca-Cola seek its passage regardless of the attitude of The Coca-Cola Company.

As President of the Association, I have been gratified at the virtually unanimous support the Association has received from its membership in seeking to preserve the traditional territorial system under which our industry has grown. The Board of Governors of the Association has been keenly sensitive to the sentiment of its members. We have been aware that one of our members, Mr. Pope Foster, obviously did not share what we viewed as the dominant sentiment among Coca-Cola Bottlers. Accordingly, we have endeavored to keep our members fully informed and to receive the guidance of their thoughts. I believe I can state with confidence that virtually all Coca-Cola Bottlers in the United States, and particularly the smaller Bottlers, support and endorse the preservation of the territorial franchise system which S. 3133 is intended to accomplish.

We appreciate your consideration of this statement and request that it be made a part of the record of the current Hearings.

Respectfully submitted.

THE COCA-COLA BOTTLERS' ASSOCIATION,
CHARLES R. RACEY, *President.*

NOVEMBER 9, 1972.

Present: Howard E. O'Leary, Chief Counsel and Staff Director; Charles E. Bangert, General Counsel; Janice Williams, Chief Clerk; J. Lucian Smith, Coca Cola U.S.A.; James Evans, Marketing Coordinator, Bottlers Operations Department, Coca Cola, U.S.A.; Joseph A. Califano, Jr., Attorney representing The Coca Cola Co.; and Donald Wessling, Attorney representing The Coca Cola Co.

O'LEARY. The record should reflect that we have been presented with a statement today of Mr. Smith's of some 28 pages which is to be submitted for the record. How would we describe this second document?

SMITH. Reconciliation of the syrup shipment numbers between those reported by Mr. Foster and those reflected in our financial records and those which were submitted in an earlier letter by me to Senator Hart.

O'LEARY. We would request that we follow the procedure of examining Mr. Evans first. This conversation is being taped. The tape will then be transformed into a stepographic transcript of the questions and answers. When the transcript is typed, Mr. Smith and Mr. Evans will have an opportunity to examine; determine whether or not it represents a true account of the answers given. I suppose if you also would like to compare that to the tape, we can make the tape available to you. The transcript would then be subscribed and sworn to in the presence of a notary public and will be placed in the hearing record of the Senate Antitrust and Monopoly Subcommittee's hearings on the soft drink bottling bills. And, the penalties for perjury with respect to the statement to be submitted would apply. Mr. Foster has provided a sworn affidvait to the subcommittee which will also be entered in the hearing record and the same penalties will apply to his affidavit. Are there any questions about that? Is that understood by both Mr. Evans and Mr. Smith?

ANSWER. Yes.

O'LEARY. All right—good. Mr. Evans, would you give us your name and address?

EVANS. James R. Evans, 1830 Mount Vernon Road, Dunwoody, Georgia.

O'LEARY. All right. How long have you worked for Coca-Cola?

EVANS. Little over 31 years.

O'LEARY. Tell us your position at the present time.

EVANS. Marketing Coordinator on the staff of the Bottlers Operations Department.

O'LEARY. Would you describe your job responsibilities or the nature of your duties?

EVANS. Well, I was liaison with the Fountain Sales Department of the company with the National Sales Department and the market development part which is coordinating their staff work in Atlanta with our field people.

O'LEARY. In the ordinary course of your duties, what, if anything, do you have to do with the establishment and enforcement of syrup quotas?

EVANS. I think it would be clearer if I said on this particular assignment I was not working in that position, but as a staff man of Mr. Smith, the president, under his direction.

O'LEARY. Ordinarily your duties are not concerned with the establishment and enforcement of syrup quotas.

EVANS. No, sir.

O'LEARY. Now, directing your attention to the date of August 24, 1972, you had a telephone conversation with Mr. Pope Foster, did you not?

EVANS. That date doesn't strike me . . .

O'LEARY. Well, let's go at it this way—sometime in August of 1972 you had a telephone conversation with Mr. Foster in which you informed him that the shipments of syrup for the months of September, October, November and December would be reduced.

EVANS. No, not reduced—talked about them.

O'LEARY. Do you recall the precise date of that conversation? I take it, you don't.

EVANS. I can't. It is on my calendar. I will give it to you when it comes.

O'LEARY. Do you recall whether Mr. Foster called you or you called him?

EVANS. Now you understand we had several conversations and I am sure I had one with him early in August; earlier than this, but on this particular conversation you are talking about my recollection is that I called him.

O'LEARY. Now would you tell us to the best of your recollection what was said in that conversation.

EVANS. Well——

O'LEARY. What did you say to him and what did he say to you?

EVANS. Well, here is what I told him—and what precipitated this was that he had requested a change in his August shipment and I said now here is what you have gotten through July—is how much gallons you have got—here is what you are going to have in August with this change. That is going to leave you a balance of some, I think close to 2,200 gallons for the rest of the year. I said here is a schedule that you could follow for these four months—you don't have to do it this way, but if you wanted to balance out in drums of syrup and truck loads of cans, this is the way you could order it. And that meant he was going to have to order a half a load of cans in September and a half a load in October and that is why I was suggesting to him—now, you don't have to order a half load each month—you can order a load and save it over—what I am trying to do is help you plan your syrup orders for the rest of the year And understand he is ordering—this syrup covers, I believe, four parts—Coca Cola, Sprite, Tab and Fresca. There was a need for him to know and anticipate in advance how much he would need of each one of those syrups.

O'LEARY. As I understand the quota applied to both canned products and the syrup.

EVANS. Total syrup, right. We calculated the cases of cans into gallons of syrup.

O'LEARY. What did Mr. Foster say to you?

EVANS. Well, he said—I can't remember exactly, but he said as he had said many times, "I wish you would get rid of that eye-dropper that you are using to ration my syrup and let me have what I got in 1971 because I could sell a lot more syrup than this and I could sell a lot more 'Sprite' and 'Fanta' than anybody else around here is selling." And I said, Mr. Foster—and I call him Podie because we are old time friends. I said, "I don't set this quota and neither can I change it. But, if these gallons are not sufficient for your dealers in your territory I would be concerned about it." And he said, "well you know they are not going to let me have any more syrup." And I said that "I don't know whether we would let you have more syrup or not. But I do know this that we want you to have enough to serve the dealers in the Taft territory." And he said "I have two dealers that would buy all the syrup you could possibly send me." And I said that "I am not talking about those two dealers—I am talking about your regular cooler customers and your regular home market customers. The ones that serve the Taft people who live in your territory." And I said, "if they are running out of Coca Cola or about to run out or likely to run out, I would be concerned about it." He said, "I never have let them run out yet." He said, "as a matter of fact on some occasions I have bought the product at retail and

resold it to them at wholesale to see that they didn't run out," and he talked about it wasn't enough but he didn't say his dealers would run out. He said it wasn't very much but it wasn't enough. So that is about the way I could reconstruct it.

O'LEARY. Do you recall anything else being said at that time?

EVANS. Well, we talked about a lot of things, as we always did because we must have had 15–20 conversations since the first of the year when I was first given this assignment. We usually talked about the same things over and over. He liked to go to great length to explain to me that he was still a faithful bottler of "Coca-Cola"; better than most bottlers; that he believed in the products and sold all of our products, whereas some of his neighboring bottlers didn't sell all of our products. And, that while he knew that nobody in the company liked him, he was still going to be faithful to "Coca-Cola" because he believed in the "Coca-Cola" business. This was something we had talked about at least ten times before. We went over the same ground and we talked about his testimony at the hearings which were a week or so before, I guess.

O'LEARY. What was said with respect to Mr. Foster's testimony at the hearings?

EVANS. Well, in a humorous vein, as he was telling me, he said, "I told them what I felt. I wasn't afraid. I am a little bottler, but I am the only one who wasn't afraid to tell them the truth about what I think about it" and I said, "well Podie, you made yourself a pretty good story up there. You sounded like a poor mistreated bottler." And I had read the transcript—I said, "you did a good job of presenting your viewpoint of being mistreated."

O'LEARY. On that occasion did Mr. Foster make a statement to you that you were trying to put him out of business?

EVANS. Yes, as he had said many times that "this eyedropper thing is going to put me out of business."

O'LEARY. On that occasion did you make a statement to Mr. Foster "don't blame me—only following orders" or words to that effect?

EVANS. Words to that effect were these—"I didn't set the quota and I couldn't change it." I did not say, "Don't blame me I am only following orders." I said, "I cannot change your quota."

O'LEARY. On that occasion did you make a statement to Mr. Foster that you did not know how the quota was made up or words to that effect?

EVANS. I don't recall that. I think I probably said I don't know who did arrive at it. I am not sure. The truth is I was not fully aware of how it was developed.

O'LEARY. On that occasion did you make a statement to Mr. Foster that the president and vice president of "Coca-Cola" had been embarrassed at the subcommittee hearings by many of the questions asked or words to that effect?

EVANS. No, sir. His testimony was no surprise to me because I had been over this same ground with him many times before.

O'LEARY. I am sorry. Perhaps you misunderstood my question. The question is did you make a statement to Mr. Foster not in relation to his testimony but in relation to the testimony of Mr. Smith that the president and vice president of "Coca-Cola" had been embarrassed at the subcommittee hearings by many of the questions asked?

EVANS. I don't recall anything about that. As far as I know they were not embarrassed. So I can't imagine why I would say that.

O'LEARY. Did you make a statement to Mr. Foster during that telephone conversation that the questions asked by the subcommittee appeared to have been based on confidential information of the company, or words to that effect?

EVANS. No, I don't recall that.

O'LEARY. Did you make a statement on that occasion to Mr. Foster that he had made quite a sales pitch in Washington and now the Senators didn't know who to believe or words to that effect.

EVANS. I said he made quite a sales pitch, as I said before.

O'LEARY. The latter portion—and now the Senators don't know who to believe. Did you make that statement?

EVANS. No, I did not add that part.

O'LEARY. Who made the decision to enforce the quota on this occasion in August?

EVANS. If you mean who made the decision to tell him what he had in the remaining of the year.

O'LEARY. Yes, sir.

EVANS. I did. There was no decision—that was just the procedure. The decision about his quota had already been made. He had 12,000 or some odd gallons for an annual quota.

O'LEARY. Prior to this occasion in August, had you limited a monthly shipment to Mr. Foster?

EVANS. We talked about his monthly requirements I think nearly every month. Almost every month we discussed what he would get for that month.

O'LEARY. Prior to this occasion had you cut Mr. Foster down with respect to a monthly shipment?

EVANS. It wasn't a matter of cutting down. The task was to try to ship his syrup to him on a 12-month basis divided by 12, but to try to give it to him on a basis of a seasonal pattern, which Coca Cola business follows. For instance, you sell 5% of your business in your lowest month; you sell twice that much in your peak month. So, you don't need it on a flat yearly quota divided by 12. The problem was to give it to him on the basis that the sales curves follow and that is why we talked about each month what are you going to need this month.

O'LEARY. As I understand it, ordinarily Mr. Foster would call you each month and ask you how much syrup he could get.

EVANS. That is correct.

O'LEARY. On this occasion, you took the initiative and you called him.

EVANS. To tell him what was left, right.

O'LEARY. You suggested a schedule of quantities he might receive for September, October, November and December. Prior to this particular occasion, had you ever called Mr. Foster and informed him that he would be limited with respect to the amounts he could receive for, say, the succeeding four months?

EVANS. No, I did talk to him in May and latter part of April and told him that while we anticipated a strike in Los Angeles in May—we were supplying his cans from Los Angeles while we were on strike in San Leandro—that if he desired to he should order a load that was over and above what we had agreed he needed in May in order that the inventory not be exhausted. Incidentally, we were on strike in San Leandro for about six months almost and we weren't absolutely guaranteed that we would get any supplies from Los Angeles.

O'LEARY. During your conversation in April you did not tell Mr. Foster this is what you are going to get for the next four months and this is a schedule which I suggest to you with limits in gallonage for May, June, July and August.

EVANS. No, there was no need for me to schedule for him then because his orders were going along about like the seasonal pattern that we needed. Except that when in July and August he asked for larger amounts than the seasonal thing would have allowed that caused a problem with the last four months. Because had he continued to order that far ahead he would have run out and he wouldn't have had enough for December.

O'LEARY. July and August he asked for amounts which were larger than the seasonal.

EVANS. That would be allowed by his quota.

O'LEARY. Now, did you cut back on his request for July and August?

EVANS. I don't remember cutting back. I know we agreed on an amount but I don't remember.

O'LEARY. And the amounts you agreed upon for July and August were both larger than his seasonal requirements?

EVANS. Ordinarily he would not have gotten that much, right—100 gallons difference.

O'LEARY. Now, you indicate that it was your decision to call on this particular occasion in August and inform Mr. Foster that he would be limited with respect to the amounts he could receive for the next four months, and suggested a schedule to him of how he might receive those amounts.

EVANS. It was my decision to call him and reconcile what he had for the balance of the year. He has always been limited.

O'LEARY. Prior to your conversation with—Well, let me put it this way. When did you make the decision to call him and inform him of what his limit was for the remainder of the year?

EVANS. My records show that I made a call to Taft on the 17th. Now what precipitated that call was that he asked for a change in the shipments that we had set up for August. He wanted to reduce the number of cans that he had ordered and add to the syrup which meant a net of about 50 gallons more than we had agreed on for August. So that is when I elected to tell him that this con-

tinued asking for more syrup is going to cause you trouble at the end of the year unless we get it reconciled.

O'LEARY. Now, is the conversation on the 17th of August the conversation that we have been referring to heretofore?

EVANS. Yes.

O'LEARY. And, as I understand it, you made the decision to tell him that this reconciliation was needed on that same day.

EVANS. That was why I called him. I calculated what would be the balance for the rest of the year. I had already calculated that incidentally prior to this but I had not talked to him about it.

O'LEARY. Do you know the date when you made the calculations?

EVANS. I don't know the exact date but it was before the first of August. Sometime when I knew what his July shipments were going to be. I calculated what he had gotten through July. Working from this sheet here shows that calculations down through July he had gotten 8,341 gallons and planned for August was 1,606 gallons. Now, that is when I had planned two loads of cans and four drums of syrup and under it is 1,648—that is when he had called me and said I want to reduce the cans and add to the syrup. So it comes up to 1,648 instead of 1,606. Now all of this was calculated. I had sent Mr. Smith a copy. He received it after at least August 15. So I was aware of the problem about August before his testimony.

O'LEARY. As I understand it the page that we are looking at here there are a number of entries that are typed; there is a stamp in the right hand corner saying received July 31, 1972 and down in the column of typed entries next to July there are a number of calculations that are made by hand.

EVANS. Shipments received through June and received through July. These were the figures I was using as official and the rest of them are my calculations including August. I calculated 1,606 for August.

O'LEARY. Those calculations made in hand are yours?

EVANS. Right.

O'LEARY. And these entries in the bottom that are made in hand—is that your writing also?

EVANS. No, that is not mine. Somebody else did that.

O'LEARY. For the record, do you know whose it is?

EVANS. No, I don't.

O'LEARY. With respect to the same sheet of paper those calculations that are made in hand next to the months of September, October, November and December—510, 510, 510 and 672—were those made by you?

EVANS. Yes.

O'LEARY. Can you tell us when those were made?

EVANS. This is my estimate of what he would need for the rest of the year. Where I was suggesting he be shipped this amount.

O'LEARY. My question is when did you make those entries?

EVANS. Well, when I got this paper, and I don't know when I got it, it had to be late in July so I knew what he was supposed to have gotten in July—so late July or early August.

O'LEARY. The stamp says received July 31, 1972.

EVANS. I usually knew that he got. I could put down the July figures by July 15. I don't know exactly when I did it but I had a fix on what he was getting. I had gotten it in July.

O'LEARY. Next to August there is an entry in hand—1,606.

EVANS. That was what I had planned on the first of August for him. He and I had agreed on two loads of cans and four drums of syrup, I believe.

O'LEARY. And then in parentheses underneath that is 1,648. Those are all your figures, right?

EVANS. Right. That is what he got after he changed . . .

O'LEARY. And is it your testimony that—Well, when did you make that entry of 1,606 and in parentheses underneath that 1,648?

EVANS. The 1,648 wasn't put in there until the sixteenth of August.

O'LEARY. The 1,648 was put in there on the sixteenth of August?

EVANS. Right.

O'LEARY. And the 1,606 was put in there when?

EVANS. That was put in there before July. That was what Mr. Smith got. I am sorry—that doesn't look right, does it This must have been done twice really. The 1,648 was a recalculation after August 15.

O'LEARY. I am sorry, I am not quite clear. You put the 1,606 in there either at the end of July or the first part of August, or when?

EVANS. What—Maybe—That doesn't make sense does it—What Smith got did not—Is this what you got the 1,648 after the August 15. This 1,606 was done before August first calculating the balance. And this paper was not—I don't know how that got in there—No, the 1,648 was not done until after August 15.

O'LEARY. You had your telephone conversation with Mr. Foster on the 17th and the 1,648 was done on the 15th?

O'LEARY. Now, the 510, 510, 510 and 672. Those entries were made when?

EVANS. I don't know exactly, but sometime in early July. Sometime after I had gotten shipments for July and in early August.

O'LEARY. Early August you made the entry of 510, 510, 510 and 672?

EVANS. 1,606 and the balance, right. It was after I had found out what he was going to get. It had to be what he and I had agreed on for August which was two loads of cans and four drums of syrup.

O'LEARY. Can you tell us whether you made those entries before or after Mr. Foster testified on August 8, 1972?

EVANS. I thought that July 31 dated the whole paper, but it sure doesn't. The 1,648 had to be later than that. The July 31 doesn't date the whole thing like I said. Then, I would have to say. I can't swear exactly when they were made except that they were made on an estimate of what August was—1,606—and then later changed. So, they were made before the 15th, but whether they were made before his testimony would be a question.

O'LEARY. Prior to your telephone conversation with Mr. Foster on the 17th of August, did you have any conversations with anyone else about informing him of this reconciliation for the rest of the year?

EVANS. No, sir. And no conversations and no instructions from anybody. It was my own administration of the quota.

O'LEARY. Did you have any conversations with respect to how this reconciliation would be prorated?

EVANS. I beg your pardon?

O'LEARY. Well, as to how the remaining portion of the early quota would be spread out over the last four months? Conversations with anybody?

EVANS. No conversations about the quota with anybody.

O'LEARY. Now, with respect to this piece of paper, can you tell us how the schedule came to be prepared?

EVANS. This is a recap of what I got when I took over the administration of the quota in January showing the 70 gallon, the plus 50 percent, the shipments in 1971 and the 1972 quota. Well, I don't really know how it was prepared, but I am sure—well—I better not say I am not sure. I know how my part—what was shipped in 1971 is, what I put down there. These others, I think, came from our market research records.

O'LEARY. If I misconstrue this, correct me. Do I understand that you got the figures say for 1970 and for the 1971 quota and under the column "shipped 1971" you compiled those figures yourself?

EVANS. No, they were compiled by the contractual department from the research department. They were given to me by the contractual people.

O'LEARY. You requested those figures?

EVANS. Yes, when I was given the assignment.

O'LEARY. Now, the last column "1972 shipped," the typed entries "695, 594, 918, 1134" and so on down to the typed entry for July "1652" and then the column next to that which is 152 beginning in January and going down to July "963 over." How did that document come to be prepared?

EVANS. The unders and overs?

O'LEARY. Yes, sir.

EVANS. Those were my calculations.

O'LEARY. My question, I guess, is when did you decide to prepare this document and make these calculations and why?

EVANS. I kept it month to month. This is a recap of what I was keeping month to month, so I had his year to date—gallons, well, to know how he stood with his quota.

O'LEARY. Does this represent a sheet which is current up to the month of July and were there prior sheets which may have been current up to the month of June and before that up to the month of May, or——

EVANS. I think this is the only typed recap. The others I had on yellow paper. I don't think they were ever typed.

O'LEARY. Sometime prior to July 31, 1972, I take it you decided to compile this information with these typed entries. Do you recall when?

EVANS. No, I don't know exactly when this was done.

O'LEARY. Can you tell us sometime in the month of July you decided to put this in typed form?

EVANS. I would guess that is right since July was the end of the shipment date that it was typed.

O'LEARY. All right. This was prepared on your own initiative or at the request of someone else?

EVANS. No, I had this prepared.

O'LEARY. With respect to this sheet did you distribute copies of it to anyone?

EVANS. Now this part Mr. Smith got a copy but he didn't get it until after at least August 15. I don't recall sending this to anybody before then.

O'LEARY. All right. Sometime around August 15, Mr. Smith got a copy of this sheet with all the entries that are on it now—all the typed entries and those in hand?

EVANS. Yes.

O'LEARY. Did anyone else get a copy of the sheet at that time in addition to Mr. Smith?

EVANS. I am not sure whether the copies are similar. The contractual department might have gotten one.

O'LEARY. Mr. Califano has shown me what * * * Is this the original or a different copy?

SMITH. That is the copy I saw this morning.

O'LEARY. Mr. Smith, if you can, go ahead.

SMITH. I really cannot identify the timing of the written numbers he wrote, but I believe that this is a part of a series of documents which were prepared for me to help me prepare both for written testimony which I gave before Senator Hart's subcommittee the following week and to prepare for the question and answer session, I believe that's what this is. I believe it is so numbered here and may indeed be part of the documents which were submitted.

EVANS. Well, now that I see this, I guess that was what was given for the testimony.

O'LEARY. Seeing this document Mr. Evans, does that refresh your recollection? Do you have a present recollection that it was prepared at Mr. Smith's request or do you just not recall?

EVANS. What I was just looking at was a xerox. You just xeroxed this today?

CALIFANO. That's right. I just xeroxed that this morning.

EVANS. What Mr. Smith got didn't have the 1,648 on it. What you got only had 1,606. The 1,648 was put in after Taft changed its request for July.

O'LEARY. The 1,648 represents an additional shipment to Taft.

EVANS. A change of it, right.

O'LEARY. Which added to—well——

EVANS. What is stamped up here received July 31 did not have the 1,648 and the 8,541 and the 9,989.

O'LEARY. The 9989 represents what Mr. Foster was over——

EVANS. No, no, that was shipped through August. 8341 through July plus 1648 that was shipments through August so I could calculate what he had for the balance of the year which turned out to be 700 gallons less than he actually got when we got the computer figures.

O'LEARY. So Mr. Smith received that document minus the 1648 entry and what other entries, sir?

EVANS. The penciled in on the side 8341 plus 1648 and 9989.

O'LEARY. I am not clear. Your present recollection now is that the document was prepared at Mr. Smith's request or don't you recall?

EVANS. If we were working on his testimony, he might have requested it or I might have just given it to him, I don't know.

O'LEARY. When were you first aware that Mr. Foster was going to testify before the Subcommittee—to the best of your recollection?

EVANS. I don't know whether on some occasion when I was talking on the phone I asked him if he intended to testify and at that time he said that he wasn't sure. But it could have been in July. I don't know when the hearings were announced really. Sometime prior to that I had an idea he was going to testify although he said he wasn't sure.

O'LEARY. And that would have been sometime in the summer of 1972. When were you first aware that he would, in fact, testify on the 8th of August?

EVANS. It was around the time he was testifying that I knew he was up here. But I knew he was up here anod I knew he was testifying.

O'LEARY. During the period from Auguest 8 when he testified and August 17 when you had this telephone conversation with Mr. Foster, did you have any conversations with anyone about his testimony before the Subcommittee?

EVANS. No conversations. I had a transcript and I read it. No conversations with anybody or—well—I am not saying with anybody—none with Mr. Smith to give me directions. I know we had none.

O'LEARY. Do you recall how you came to be in possession of a transcript of his testimony.

EVANS. Mr. Smith's staff man gave me a copy.

O'LEARY. Will you identify him for the record?

O'LEARY. Do you recall when you got the transcript of Mr. Foster's testimony?

EVANS. I don't recall.

O'LEARY. In any event, you received it prior to your telephone conversation with Mr. Foster on the 17 th of August.

EVANS. I can't swear to that. Sound like we got it in a hurry. As I remember, we were a little late getting it. Somewhere around there I could't swear that it was before. I knew what he said so it must have been before. Because I was talking to him about it.

O'LEARY. Can you tell us why you received a transcript of his testimony before the subcommittee?

EVANS. I don't think it was any special reason except that I am involved in the administration of his quota.

O'LEARY. When you received the testimony from Mr. Glover, did you receive anything else along with it—a memorandum or something?

EVANS. No.

O'LEARY. And you had no conversation with Mr. Glover as to why you received a transcript of Mr. Foster's testimony.

EVANS. No, sir. Just that I was interested in it.

O'LEARY. Had you requested Mr. Glover to send you copies of the transcript?

EVANS. Yes. I said "I would like to see it when you get one."

O'LEARY. Do you recall when you made that request?

EVANS. No, I don't. Not exactly.

O'LEARY. Can you tell us why you wanted to see it?

EVANS. Yes, because I was very much interested in what he had to say. Since I was involved in his . . . I had had many conversations with him about it.

O'LEARY. Prior to your conversation with Mr. Foster on August 17, did you have any conversations with anyone with respect to his opposition to the bill?

O'LEARY. I can't recall anything specifically but I am sure that I have talked to somebody about the prospect that he was going to testify. I don't recall but I am sure that sometime when I was talking to him on the phone and talking about whether he was going to testify I suspect it is reasonably certain that I told somebody.

O'LEARY. After you had conversations with Mr. Foster during the summer of 1972 in which you learned of the possibility that he might testify, did you inform anyone else in the company or did you reduce anything to writing?

EVANS. No.

O'LEARY. Did you see anything in writing other than the transcript of Mr. Foster's testimony regarding his testimony?

EVANS. No, I saw the magazine article which he published which I assume would be essentially what he would say.

O'LEARY. But you never saw any sort of accompanying memorandum or——

EVANS. Nothing about his testimony.

O'LEARY. As I understand it, you had no conversation with anyone about his testimony.

EVANS. No, sir.

O'LEARY. No conversations with anyone about your telephone conversation with Mr. Foster in which you were going to reconcile the remaining portion of the quota of the last four months of the year.

EVANS. No, sir.

O'LEARY. After you provided Mr. Smith with this document you had no conversation with Mr. Smith as to its contents?

EVANS. No, sir, we didn't. I wasn't in on his testimony past that.

O'LEARY. At anytime prior to your conversation with Mr. Foster on the 15th of August, did you have any conversations with anyone as to Mr. Smith's testi-

mony before the Subcommittee. Specifically, as to Mr. Smith or the company being embarrassed by the questions asked?

EVANS. No, sir.

O'LEARY. Any conversations with anyone to the effect that the questions asked by the Subcommittee appeared to be based on confidential information of the company?

EVANS. There is nothing about that in the testimony. I think what I told Foster at one point—We talked about where the pink sheet out of New York was given; talked not in relation to the committee but the newsletter out of New York was getting letters that we didn't write to them or I can't remember what that was. Thought some bottler was sending them letters from the company, but I am not really specific about it.

O'LEARY. The pink sheet out of New York I take it is the trade paper of some kind.

EVANS. Right.

O'LEARY. And you had a conversation with Mr. Foster in which possibility of letter coming from a "Coke" bottler was being given to this trade publication?

EVANS. Right. This was before the testimony of the Subcommittee. Just about things in general.

O'LEARY. Do you recall when you had this conversation with Mr. Foster?

EVANS. I think it was early in the year like February or March when he told me that the lady was calling him on the telephone. All I can say was it was long before July. Well, I guess it was after the soft drink industry article appeared which was in May and he said the lady from the newsletter might come out to interview him. That was what we talked about.

O'LEARY. Sometime after your conversation with Mr. Foster on August 17, you had a subsequent conversation with him about increasing his quota for September, October, November and December. Is that correct?

EVANS. Right.

O'LEARY. Can you give us the date of that conversation?

EVANS. That was September 8, 1972.

O'LEARY. Do you recall whether you called him or did he call you?

EVANS. My recollection is that I called him.

O'LEARY. Can you tell us what was said during that particular telephone conversation?

EVANS. Well, basically, "it has been determined that your quota would be changed, and that you would be given for the year a quota based on seven percent increase over your 1971 purchases. The seven percent being arrived at by the growth of the other California bottlers in that area. Year to date through July, there has been about a seven percent growth, and that you will now be given credit for that amount in 1972 less what you have already gotten in 1972." That came to about 15,000 gallons less what he had gotten through August which I calculated 9989 and told him what he would have for the balance of the year which amounted to about 1400 gallons a month.

O'LEARY. That was a seven percent increase in the shipments given in 1971.

EVANS. I am sorry—yes—in 1971.

O'LEARY. And during this telephone conversation what did Mr. Foster say to you?

EVANS. I don't recall that he had much to say except that he appreciated any increases in the syrup, and we talked about how we arrived at the figures, but I don't recall any specifics about our conversation other than these new figures.

O'LEARY. On that occasion, did you make a statement that they had cut his syrup allowance too far down or words to that effect?

EVANS. It couldn't have been that way. We hadn't cut it down except given him a 1970 quota. I told him exactly how that came out but we had reconsidered, I believe, based on the fact that Mr. Smith didn't realize that we were still using 1970 figures, instead of 1971 figures. And a decision was made to update the thing rather than go back to the old 1970 figures.

O'LEARY. Did you make a statement that the powers that be had decided to change the formula to allow him the amount he had received in 1971 plus an additional seven percent?

EVANS. Something to that effect. That it had been decided to change his quota.

O'LEARY. Who made that decision, if you know?

EVANS. Mr. Smith made the decision as a result of a staff meeting.

O'LEARY. Were you present at the staff meeting?

EVANS. Yes.

O'LEARY. Would you tell us when that staff meeting took place?

EVANS. That was September 8.

O'LEARY. And where did that staff meeting take place?

EVANS. Mr. Smith's office.

O'LEARY. In Atlanta?

EVANS. Yes.

O'LEARY. Who else was present in addition to Mr. Smith and yourself?

EVANS. There I am hard put. Mr. Smith, Mr. Susong . . .

O'LEARY. Could we have the spelling on his name if you know it.

EVANS. Yes—S U S O N G

O'LEARY. O.K.

EVANS. Somebody from the legal department, but I don't know who it would have been specifically.

O'LEARY. The legal department of the company?

EVANS. Right.

O'LEARY. Anyone else?

EVANS. I don't recall anyone else. I could be mistaken.

O'LEARY. Do you recall approximately what time of day this meeting took place? Morning or afternoon?

EVANS. No, I don't.

O'LEARY. Can you tell us what was said to the best of your knowledge?

EVANS. That I haven't thought about. The essence of it was that Mr. Smith. . .

O'LEARY. To the extent that you can recall I would like you to try and tell us what was said as opposed to your characterization of the discussion in general. What did Mr. Smith say, what did you say, what did Mr. Susong say?

EVANS. I didn't have too much to say and I don't recall what the others said. I haven't thought about that until just this moment. So I would be just guessing to tell you the conversation.

O'LEARY. Well, the subject of what Mr. Foster was receiving was the reason for the meeting. Is that correct?

EVANS. Yes. We wanted to review how his quota was established. Whether it should be changed or . . .

O'LEARY. Do you recall when you were requested to come to this meeting? Who called the meeting to the best of your recollection?

EVANS. I think Mr. Smith did since it was in his office. I don't know who notified me, and I don't remember when I got the call.

O'LEARY. Do you recall whether you took any records to Mr. Smith's office with respect to this meeting?

EVANS. I am sure—I don't recall exactly what I had. I am sure I had something like this—about what his quota was and what he had gotten.

O'LEARY. Do you recall whether or not you were informed of the meeting by some document in writing or whether you were informed verbally by somebody?

EVANS. No, I don't.

O'LEARY. Do you recall how long the meeting lasted?

EVANS. No, I don't.

O'LEARY. Was the subject of Mr. Foster's testimony before the subcommittee mentioned in this meeting?

EVANS. No, sir, that was not discussed.

O'LEARY. Was the subject of Mr. Foster's opposition to the bill discussed at that meeting or mentioned at that meeting?

EVANS. What Mr. Foster felt didn't come up in this meeting.

O'LEARY. Well, was there any mention that the quota reconciliation of August 17 might be interpreted as a reconciliation or retaliation for Mr. Foster's testimony. Was that mentioned?

EVANS. I can't recall who might have brought that up. I am sure that the fact that he was getting little syrup for the balance of the year probably entered into it. But, I don't recall somebody making that particular statement although I know I didn't, but it could have been made by somebody.

O'LEARY. We are going back now from—its now November—we are going back to September 8, two months ago. Can you tell us a little more about what was said with respect to that particular meeting?

EVANS. Not exactly who said what. I know what the meeting was about and how we came out with a new quota for him.

O'LEARY. Tell us what you do recall of the meeting.

EVANS. The thing that was discussed most, I believe, was how did we arrive at this 1970 plus 50% quota and how did we administer this quota in 1971 so

that we got more than his quota and we talked about administrative error where he got a couple of shipments that we were late in reporting and that since he had gotten nearly 15,000 gallons in 1971, why did we not consider moving ahead a year since this was 1972 rather than continuing back to 1970. On the basis that we wanted him to have what it took to serve his territory and that a 1971 history may be more reflective of that need than a 1970 figure. And if it were, we should up date it.

O'LEARY. You knew how the 1972 quota had been arrived at prior to that meeting, right? You were keeping track of it month-by-month?

EVANS. I just knew what it was. I didn't know how it was arrived at.

O'LEARY. I see. O.K. And at the time of the meeting, did you know how it was arrived at?

EVANS. I think it was discussed in there, how it was arrived at. As I recall it was.

O'LEARY. O.K. Mr. Susong of the contracting department—his responsibilities are to keep track of what is shipped or what goes?

EVANS. No. He was responsible for it in 1971 or at least part of 1971. I am sure not all of 1971.

O'LEARY. You had previously supplied a copy of this sheet we referred to, to Mr. Smith, right; which the second and third column is 1971 quota parenthesis 1971 plus 50% end parentheses? Right? So the thrust of my question is at this meeting both you and Mr. Smith certainly knew what the basis of the 1972 quota was. Did you not?

EVANS. The 1972 quota? Yes, we knew what it was.

O'LEARY. You knew that it was 1970 plus 50%. All right. Now. Do you recall whether Mr. Susong or the man from the legal department had a copy of this sheet of paper in front of them?

EVANS. I don't know. I suspect . . . I guess they had the figures from somewhere either this one or some others.

O'LEARY. Is it your recollection that they did not know what the 1972 quota was based on?

EVANS. I don't know. I don't remember that. I couldn't say.

O'LEARY. Was the subject mentioned that for the last four months of 1972 Mr. Foster was receiving a heck of a lot less than he had received for the previous eight months?

EVANS. I am not sure it was put in those terms, but what he was to get for the rest of the year was discussed.

O'LEARY. Can you tell us anything more about what, if anything, was said about why you were going to recompute the amount he would be shipped in 1972—increase the amount that he was to be shipped?

EVANS. Other than the fact that Mr. Smith thought that 1971 index was a better reflection of what he needed than the 1970 index.

O'LEARY. Do you recall Mr. Smith saying anything about the amounts being shipped in September, October, November and December might look like a reprisal for his testimony?

EVANS. I don't recall that being specifically said. I just don't know.

O'LEARY. Well, did you say anything about it?

EVANS. No, I did not say anything about reprisal?

O'LEARY. Don't limit yourself to the word reprisal. To the best of your recollection, what was said along the lines that perhaps this looks bad or words to that effect.

EVANS. My approach was that we didn't want to put him out of business. We are trying to keep him in business and this might look like we are not doing our very best to keep him in business. He might really need more than this to serve his customers in Taft.

That was one of our objectives was to give him what he needed to serve the dealers in the Taft territories other than those two who were shipping outside of his boundaries.

O'LEARY. Well, in addition to not putting him out of business and giving him what he needed to serve customers in Taft, what, if anything, was said about this looking bad or words to that effect?

EVANS. Talking about looking back?

O'LEARY. Looking bad.

EVANS. Oh. Looking bad. That part I don't recall. It may have been brought up, but it was not by me; and it could have been discussed, and I really missed it.

O'LEARY. That is not the kind of thing that would have been missed.

EVANS. Well, what I am saying it would look bad, I agree. When I said "it would look like we were trying to put him out of business" that would look bad to me. We are not trying to put him out of business, but this might look like it.

O'LEARY. Well, let me ask you this, Mr. Evans. In your own mind you knew that he testified before the subcommittee and you knew that the amounts that he was scheduled to receive from September to December. Do you think that there might be a relation between the two?

EVANS. No, sir, that would be unthinkable. That never entered my mind that any reconciliation of that quota had anything to do with his testimony.

O'LEARY. There wasn't any fear on your part that someone else might?

EVANS. That had never occurred to me.

O'LEARY. Did you ask Mr. Smith to call this particular meeting?

EVANS. No, I didn't It was not at my suggestion.

O'LEARY. Can you tell us how Mr. Smith knew Foster's situation with respect to the syrup?

EVANS. In preparing his testimony this is where it came to his attention. How the quota was being administered.

O'LEARY. Prior to this meeting on September 8, in Mr. Smith's office, specifically between August 17 and September 8, 1972, did you have any conversations with anyone that perhaps the 1972 quota was unrealistic and might not meet Mr. Foster's needs or might put him out of business?

EVANS. I don't recall. Between this time and the September 8. I did not talk to Mr. Smith about it. Now, whether I talked to one of his staff I don't know; but it was not initiated by me.

O'LEARY. Did you put anything in writing after August 17 with respect to your dealings with Mr. Foster; namely, your conversation with him on the 17th.

EVANS. No, sir.

O'LEARY. Did you put anything in writing with respect to the fact that the shipments scheduled for September through December might not meet his customers' needs or might put him out of business?

EVANS. Did you say did I put anything in writing?

O'LEARY. Yes, sir.

EVANS. No, sir.

O'LEARY. And you didn't have any conversations with anyone that you can recall about that subject.

EVANS. No, sir.

O'LEARY. Were you concerned that you might put him out of business?

EVANS. Well, looking at his 510s that was not immediately a concern of mine. When I was telling him about it, but when I reviewed this thing from day-to-day or sometimes from week-to-week as I did, I began to see that it was going to be less than he got in 1970 which I thought might be a little bit less than his customers would need and the problem was that if he was not getting enough to supply the dealers in Taft as I had told him would be a concern of mine. And I would want to recommend something but I had not got to the point where I was ready to recommend something.

O'LEARY. Sometime after August 17 and before September 8, you were concerned the proposed shipments from September through December were less than the shipments in 1970

EVANS. Right.

O'LEARY. But you did not pass that concern on to anyone else to the best of your recollections?

EVANS. No, I did not bring it to a head because we met on September 8 and he had gotten a pretty good shipment for August. Had it gone on much longer, I only had a week to be concerned about it by myself before Mr. Smith called me.

O'LEARY. Were you surprised when you walked into Mr. Smith's office and found that this was the subject of the meeting?

EVANS. No, I wasn't surprised.

O'LEARY. Sometime prior to that meeting you were informed that this was to be the subject of the meeting?

EVANS. Right.

O'LEARY. But that was not your initiative. It came from somebody else?

EVANS. Right.

O'LEARY. I believe you indicated that you took over this assignment of dealing with Mr. Foster month-to-month in February of 1972?

EVANS. Actually, I went to see him in December 1971 and got the assignment in December 1971 just before San Leandro went on strike.

O'LEARY. When were you first aware that Mr. Foster was running ahead of his quota?

EVANS. In April when he was running just for the four months he was just about even with his quota when I called him and suggested that if he wanted to he should order some more than we had agreed on for April because there may be a strike in Los Angeles. So in May he was over his quota and continuing . . . He ordered about the same monthly requirement in June as he had in 1970.

June was pretty close to what a normal monthly requirement was. It did not deduct anything from that May which was over quota and then in June when he asked for more than his normal requirement to meet that promotion, I knew he was over quota. And then when he asked for the same consideration in August, I knew he was over quota and at that point he was over quota to such an extent that concerned me about how he was going to get back in the quota for the balance of the last 4 months of the year, being much smaller months than the summer months and had he continued to request more than his normal requirements, he would have been out of business.

O'LEARY. Why did you wait until August 17 to enforce the quota?

EVANS. That was precipitated by his calling and asking for another increase over his normal requirements and I had calculated that he was already quite a bit over quota and in order to come back within was going to have to reduce his last four months and then when he asked for another increase of 48 gallons I thought this was the time * * * and August being the last big month in the summer, if you are going to adjust anything you can't go much past August because there is not enough left in the last four months to make any adjustments.

O'LEARY. It is your testimony that the enforcement of the quota as of August 17, 1972 had nothing at all to do with his testimony before the subcommittee on September 8, 1972.

EVANS. No, sir.

O'LEARY. You did not relate the two in your mind at all?

EVANS. No, sir.

CALIFANO. Would you explain why Mr. Foster wanted and why you gave him more syrup or whatever in July and August of 1972.

EVANS. Yes. He called and we were working on what we had agreed he would get that month and he said that Pepsi was running a strong price promotion in his territory because they were retaliating against our Bakersfield bottler who had introduced a new package and had a very attractive introductory offer on the new package. Pepsi was countering it with a very low price and that included his territory. Those territories being contiguous and he said if I don't do something about it they will run me off the shelf in these supermarkets and so I need something to combat them with while this promotion is going on. And that was when I said well you know you can order this in July but it has to come out later, but if you think it is important not to get run out of the stores during this Pepsi promotion to maintain your shelf position, I will go along with it. And it was still going on in August which is why I agreed to the 1606 in August which was a little bit more than he should have gotten based on his quota and what * * * that is when we gave him a little bit more in August—more than his normal requirement. Then in the middle of August he was asking for another increase that is when I said we better reconcile these accounts before it is too late.

O'LEARY. Would you give us your name and address please, Mr. Smith?

SMITH. Yes, sir. I am J. Lucian Smith. I live at 3668 Dumbarton Road, N.W., Atlanta, Georgia.

O'LEARY. On page 16 of the statement that you filed with the subcommittee that was given to us today the second paragraph reads:

"In or about late July 1971 or early 1972, in the hope of avoiding the problems encountered during 1971, responsibility for coordinating shipments to Taft was given to Mr. James Evans."

Did you play any part in giving that responsibility to Mr. Evans?

SMITH. Yes, sir. I believe there may have been a misstatement there. It doesn't say late July.

O'LEARY. Oh, I am sorry.

SMITH. Late 1971. Yes, sir, I did. I gave him that assignment.

O'LEARY. Can you tell us when you were first aware of the quota that was enforced on Mr. Foster and what the quota was based upon?

SMITH. Yes, sir. Sometime prior to August 1971, in consultation with our house lawyers and our retained lawyers, the quota was established as the sales of 1970 plus 50%.

O'LEARY. You say in consultation with your lawyers. Was it your decision as to what the quota should be ultimately?

SMITH. I am sure I could have overruled it in that sense, yes.

O'LEARY. I take it someone else came up with the formula and you approved it, or was the formula your own calculation?

SMITH. I believe the idea of a quota and the amount of the quota was proposed by our attorneys.

O'LEARY. Directing your attention to the year 1972, when were you first aware that Mr. Foster might be running over his quota?

SMITH. To the best of my memory not until the briefing of me preparatory to the hearings in August. In fact, not until then was I aware that the quota system established sometime prior to August of 1971 was still the quota system. In other words, I did not know that 1970 was continuing to be used as the base year nor did I know that the over shipments above the quota in 1971 which resulted from our administrative mishandling was not the basis for 1972.

O'LEARY. When Mr. Evans was given the responsibility of coordinating the shipments to Taft bottlers, was he made directly responsible to you or to someone else in the company?

SMITH. In this function he was directly responsible to me.

O'LEARY. Dealing with this particular sheet that we referred to during the questioning of Mr. Evans which is entitled, "Taft, California—All Products," left hand side of the top of the page number "5"; right hand side top of the page "Received July 31, 1972 J.L.S." Does that stamp "J.L.S." indicate the day that you received this particular sheet of paper?

SMITH. Yes, it indicates the day it was received on my secretary's desk. All in-coming mail is stamped.

O'LEARY. As I understand it, this sheet was prepared at your request.

SMITH. I can't specify this particular sheet for certain but I would believe certainly that it was part of much data that was accumulated as background data in preparing our testimony before Senator Hart and in preparing me for the question and answer session.

O'LEARY. At that time or prior to July 31, 1972, you were aware that Mr. Foster might testify at the hearings.

SMITH. I think it would be right to say that we all speculated that he would.

O'LEARY. Can you tell us precisely why you wanted this background material; namely, this particular sheet in preparation for the hearings.

SMITH. We were preparing my testimony for the purpose of giving us much of the facts that we could do Senator Hart about the legislation pending. This was certainly a part of that preparation.

O'LEARY. And, is it fair to say you wanted this sheet in anticipation of the fact that Mr. Foster might testify and you might need this information when you testified?

SMITH. I think it would be pure speculation but I think I could say that we felt certain that this would come out as one of the questions you wanted answers to as part of all of the relevant material to the proposed legislation.

O'LEARY. Directing your attention to this sheet, all of the entries that are in type were on it when you received it?

SMITH. I can't really testify to that. I believe they were but I don't absolutely, certainly remember that.

O'LEARY. What about these entries that were made by hand, specifically those under the 1972 shipped column for the last four months, namely, 510, 510, 510 and 672?

SMITH. Anything I said about that would be pure presumption because I frankly do not remember this particular sheet of paper.

O'LEARY. You don't recall whether those entries were on the sheet at the time you first got it or not?

SMITH. No, sir.

O'LEARY. Perhaps I should ask this: When you received this sheet, were you aware at that time that Mr. Foster was running ahead of his quota?

SMITH. Are you fundamentally asking me when I became aware that Mr. Foster was ordering in excess of his quota?

O'LEARY. Yes, sir.

SMITH. I don't believe I can answer that question, truthfully.

O'LEARY. Prior to Mr. Evans' conversation with Mr. Foster on the 17th of August, were you aware that a reconciliation was going to have to be made for aware at that time that Mr. Foster was running ahead of his quota?

SMITH. No, not to my memory.

O'LEARY. When did you become aware of this telephone conversation that Mr. Evans had with Mr. Foster on the 17th?

SMITH. I became aware of it. I cannot be precisely certain when. But I believe at the time of the meeting on September 8 which has been previously referred to. I am not absolutely certain.

O'LEARY. You had no part in Mr. Evans' action in informing Mr. Foster of the reconciliation on the 17th or of the proposed schedule of shipments for the last four months?

SMITH. In regard to that specific situation, no. What I mean to say is I only appointed him to his job—beyond that I do not know.

O'LEARY. But, after that particular conversation that Mr. Evans had with Mr. Foster he did not come to you and report to you what he had done or the schedule he had proposed.

SMITH. No.

O'LEARY. And you did not know of it until the meeting on September 8, 1972?

SMITH. To the best of my memory.

O'LEARY. O.K.

SMITH. I think it is important for me to be precise with you. I don't really know when I learned that information. But I believe on the day of that meeting. I am sure not sooner than that.

O'LEARY. I believe it has been brought up that you may have interposed the 18th when you meant the 8th as the day you became aware of the telephone conversation between Mr. Evans anl Mr. Foster and proposed schedule of shipments for the last four months of the year.

SMITH. I believe so, yes. It was the 8th not the 18th.

O'LEARY. Directing your attention to that meeting on the 8th of September 1972, can you tell us who was present at that meeting?

SMITH. No, sir. Not with certainty. I can tell you what I guess happened. Because I know why I called the meeting and I guess I know why they came there. I would like to be sure you understand this. It was not until my preparation for testimony before Senator Hart's committee that I learned we were using 1970 as the base year to which the 50% increment was being applied for 1972. When I learned that I then concluded that that was not fair and that as soon as I could I wanted to bring together the people responsible for administering the program and if there were not strong legal reasons bearing in mind that there is litigation going on in this matter, if there were not strong legal reasons for not doing so, I wanted to change the quota. It seemed to me not reasonable to expect a man to gear his business up to operate a certain level which is what happened in 1971 through an error of our own and arbitrarily cause him to reduce that level of business operation. Now that was my determination as soon as I learned that that was the basis the quota was being applied. The first time I could get the meeting together was the 8th. I am sure that somebody from the legal department was there. I am not sure whether it was Mr. Lawson, general counsel, or Mr. Atwood. One or the other. Mr. Evans remembers Mr. Susong being there. I do not. But it would be reasonable to expect that he was there. And I remember no one else.

O'LEARY. What do you recall being said at this particular meeting?

SMITH. I can't even begin to quote what anybody said to anybody. I know the reason I called the meeting which I have just stated to you and it was to verify again whether that was the case and to determine if there were any legal reasons for not changing it. We determined that there was none and did change it.

O'LEARY. Do you recall whether or not you prepared anything in writing and circulated it to anyone in the company in preparation for this meeting?

SMITH. I recall that we did not. I believe the people were invited by telephone and there was no notice.

O'LEARY. At the time of the meeting on September 8, 1972, were you aware that the shipments proposed to Mr. Foster were 510 for September, 510 for October, 510 for November and 672 for December?

SMITH. I do not specifically remember that. But I am quite certain again perhaps somewhat presumptively, but I am certain that we must have reviewed what the status of the shipments were but I don't have a specific memory of that.

O'LEARY. Do you have any recollection of being aware that, for example, they were lower than the gallons shipped in 1970?

SMITH. The remaining four months?

O'LEARY. Yes, sir.

SMITH. I don't have that specific memory. I do remember that he had a very small amount of volume that he would be able to handle the rest of the year.

O'LEARY. During the course of that meeting on September 8 was anything said by anyone with respect to Mr. Foster's testimony before the subcommittee?

SMITH. I can't testify that nothing was said or wasn't. I can assure you that as of this day I have not read Mr. Foster's testimony. His testimony had no bearing at all on the calling of the meeting or the action of the meeting.

O'LEARY. As I understand it you cannot recall whether or not anything was said about his testimony before the subcommittee, or, if, in fact, anything was said, what it was?

SMITH. I am very anxious to be responsibe to you, but I run meetings like this all the time and it was on a tight schedule; I know what we intended to do. I am very certain, though I frankly have no memory about it, but I am just very certain that that kind of thing wasn't talked about because it wasn't the reason for the meeting.

O'LEARY. Do you recall how long the meeting lasted?

SMITH. No, sir.

O'LEARY. Do you recall whether or not anything was said by anyone that the imposition of the quota for the last four months might be misinterpreted in view of Mr. Foster's testimony before the subcommittee?

SMITH. I am afraid not. Like I said, my determination had already been made before the meeting was called and the purpose of the meeting was to discuss were there any reasons for not upping that quota.

O'LEARY. Well, Mr. Smith, in your own mind were you at all concerned that someone might misinterpret the quota imposed for the last four months?

SMITH. I can assure you that our purpose was one of fairness.

O'LEARY. I understand that, but . . .

SMITH. I don't remember any such thing as that being in my mind.

O'LEARY. Turning to page 20 of your statement which has been given to us today at the bottom of the page "it was the consensus of the meeting that an attempt to return to the original allowance in 1972 might be harsh in light of its having been exceeded during 1971 and would moreover be misunderstood by Taft as retaliatory or punitive." Is that inaccurate?

SMITH. No, I think not.

O'LEARY. But, it is your testimony that the subject to the best of your recollection was not mentioned during the meeting of September 8, nor was in your own mind.

SMITH. Well, it is my testimony that I don't remember any conversation about it and I don't remember it being in my mind. But, it is also my testimony that I believe this is an accurate statement.

O'LEARY. However, that does not reflect your state of mind as of the meeting on September 8, 1972. Is that correct?

SMITH. What I want to be saying to you is that I don't remember that being in my mind at that meeting, but we certainly did not want this kind of reaction to happen in anybody's mind.

O'LEARY. This statement is inaccurate when it says "it was the concensus of the meeting, etc."

SMITH. That is an accurate statement.

O'LEARY. But as I understand it, Mr. Smith, you are telling us that your recollection of the meeting was that it was not mentioned and that it was not in your mind.

SMITH. Well, what I intend to be saying to you is that I don't remember that subject being discussed at that meeting. Nor do I remember it being in my mind at that meeting.

O'LEARY. Then it was not the concensus of the meeting that the original allowance might be misunderstood by Taft as being retaliatory or punitive. Is that correct?

SMITH. What I am very anxious to do and I don't want to be hard-headed about this. The decision I made to call this meeting was based on the fact that I felt we were being unfair to the man. We obviously didn't want to do anything that would be misunderstood by you or the public or anyone else. This is written

to express that point of view. And, I just don't remember what was in my mind at that time and that was my response to your statement.

O'LEARY. Well, I understand that but I am trying to ascertain what happened during the meeting on September 8, 1972.

SMITH. I believe this is an accurate statement of that fact and if I can restate something that I have said earlier to clarify whatever issue there is I would be glad to do so.

O'LEARY. But, it was not mentioned to the best of your knowledge? And the fact that adherence to the original quota might be misunderstood was not in your own mind during that particular meeting.

SMITH. I suppose that what I have to say is that we were concerned that what we were doing might be misunderstood by certain parties.

O'LEARY. Well, when you say we, was it mentioned?

SMITH. I can only be honest with you, sir, and I do not remember whether it was mentioned. I mean I just simply cannot tell you honestly what the dialogue was at that meeting. I can tell you that I called it and I can tell you why I called it, and I can't tell you what we did at it. I can't really honestly testify what was said by anybody at that meeting.

O'LEARY. Why was the lawyer there?

SMITH. The issue concerned a litigation that was going on between the two companies and the lawyers were obviously heavily involved with the matters with concern to that litigation. Indeed, as I have said earlier the quota system was originally proposed by the attorneys and indeed as this statement, I believe says, was administered during the first, I believe maybe six months of 1971 by the attorneys and it seemed to me terribly imprudent to make any changes in that system without having those attorneys present.

O'LEARY. Well, I believe you indicated that this particular schedule of the shipment to be made for the last four months you became aware of—to the best of your recollection—on the day of the meeting on September 8.

SMITH. What I attempted to say earlier was that I frankly do not specifically remember when I first looked at this sheet or when I looked at these numbers. But no doubt either this sheet or one very much like it would have been involved in that meeting on the 8th.

O'LEARY. But you do not recall you or someone else in your presence consulting the lawyers and saying, "Well, how will this look in view of his testimony before the subcommittee? Will that look bad, might someone * * *" you don't recall any specific conversation with respect to that subject.

SMITH. No. And I have to tell you that I am really not able to reconstruct any of the dialogue of that meeting in my memory.

O'LEARY. As I understand it until you had begun preparing your testimony for the subcommittee hearing you were not aware that the 1972 quota was based upon his shipments in 1970.

SMITH. Plus 50%.

O'LEARY. Plus 50%.

SMITH. That is correct.

O'LEARY. Do you have any recollection as to why you waited a month approximately to ascertain whether or not that was fair.

SMITH. It was about three weeks. In fact, it was the first time I had a chance to get the group back together.

O'LEARY. After Mr. Foster testified before the subcommittee can you tell us whether or not you had any conversations with anyone about the nature of his testimony?

SMITH. I do not recall any specific conversation. I remember sort of hallway comments with various people. Some of these comments were reported in papers. Atlanta papers. I don't recall any specific conversations about it. What he had to say as it was reported in the press.

O'LEARY. After your testimony before the subcommittee on—I believe it was—August 9, did you have any conversation with anyone to the effect that you were embarrassed by the questions that were asked by the subcommittee.

SMITH. Indeed not. In fact, just the opposite and I so wrote Senator Hart and Mr. Bangert. They extended great courtesies and asked no embarrassing questions.

O'LEARY. Did you have any conversations with anyone to the effect that questions asked appeared to be based upon confidential information of the company.

SMITH. No indeed. In fact, the questions asked were based upon data we submitted to the committee.

O'LEARY. You had no conversations with anyone else in your company on this subject.

SMITH. I want to be sure I understand your question.

O'LEARY. All I am asking, sir, is did you have a conversation about these subjects with someone else?

SMITH. Again, I want to be sure that I am responsive. We obviously had a good deal of conversation in preparation for our testimony. In regard to our being asked any embarrassing questions as a result of the data we submitted, I never so stated to anyone. Nor discussed it with anyone.

O'LEARY. The same I take it applies to any conversations to the effect that the questions asked appeared to be based upon confidential information.

SMITH. Absolutely never associated.

O'LEARY. You have no recollection of any specific conversations that you might have had with anyone about Mr. Foster's testimony.

SMITH. No. No, sir, as I stated earlier. I have not yet read his testimony. I have discussed it in a structural way with no one ever. I am quite certain though, though I can't identify with whom or where that I had heard people make comments about the press report of what he said. I had no conversations as such with anyone about that testimony.

BANGERT. On this last point, Mr. Smith, in what you described as general hallway conversation and that type of thing that you may have heard, did you ever express dissatisfaction with respect to Mr. Foster's testimony?

SMITH. No.

BANGERT. So that you never indicated at all that he shouldn't have testified the way that he did or that he testified falsely or that he misled the subcommittee on anything along that line?

SMITH. No, absolutely not. I have read that article but I don't really factually know what he said.

O'LEARY. Mr. Smith, let's go back to the meeting on September 8, 1972. What do you recall being discussed as to the ultimate formula that was arrived at namely the amount received in 1971 plus an additional 7%?

SMITH. If I am not responsive tell me. We decided—in fact, I had decided before they got there—we concluded to do it because there was no objection interposed. To let the actual sales to him, that is the actual purchase in 1971, plus an amount equal to the average increase of all the other bottlers in the western area here to date, excluding San Francisco which had been on strike from the current and the base year. At that point, I did not know what the percentage number was. I instructed someone, I don't remember whom, to calculate that number and it was fed into the quota. It was not until sometime later that I learned that number was 7%.

O'LEARY. Was that particular formula arrived at during the meeting?

SMITH. I arrived at it in my own mind earlier. I proposed it at the meeting and it was adopted.

O'LEARY. Would you tell us why you arrived at the particular formula?

SMITH. I would be glad to. When a fellow operates a business he staffs it at a certain level to accommodate a certain volume and if he gets drastic swings one way or the other, he has to change the staffing. It would seem to me it would be unreasonable to cut that plant in its volume as much as it would have had to be cut if we continued to administer the quota which had heretofore been administered; namely, with 1970 as the base.

O'LEARY. Prior to the meeting did you consult with someone else in the company as to arriving at this particular formula or what was fair for this particular plan before you went into the meeting?

SMITH. I don't remember any such questions. Or any such discussion.

O'LEARY. It was the fact that the quota was based upon 1970 plus 50% and in the fact that during the last four months to meet his quota he would be getting low shipments that caused the change?

SMITH. Yes. Frankly, I had assumed without discussing it with anybody that the formula; namely, the base year plus 50% would be a move forward formula. And I never discussed it with anybody but had assumed that it was not until I was being prepared for my testimony that I learned that was not the fact.

O'LEARY. So the record is clear, as I understand it you had believed in 1971 he would receive his 1970 quota plus 50%, in 1972 he would receive his 1971 quota plus 50%?

SMITH. Yes. I had never discussed that with anyone but I had assumed that was the working of the formula.

O'LEARY. Do you recall, I mean, during the meeting did you become aware of the specific amounts that were to be shipped over the last four months?

SMITH. I repeat. I frankly don't remember that, but most certainly I did. It is conceivable that I didn't but I don't have a specific memory of it.

O'LEARY. Okay. Thank you.

CALIFANO. Mr. Smith, when did you first become aware that Mr. Foster had written a letter to the subcommittee?

SMITH. I have to refer to this to get the specific date but it was subsequent to our meeting. At the time of our meeting on the 8th, I did not know it. I did not know it until the 13th. I beg your pardon. Until the 13th when it appeared in the Washington paper and was reported to us.

CALIFANO. Did you ever tell Mr. Evans or anyone else to reduce or hold his quota from the time you heard that Foster was going to testify until the time of your meeting on September 8?

SMITH. I absolutely did not.

CALIFANO. Was one of your considerations of that meeting in terms of retaliatory or punitive relating to the lawsuit, as distinguished from the testimony here. Is that possible?

SMITH. I frankly don't remember it but it certainly is possible.

CALIFANO. I don't have anything else. I would like to just speak for the record on the confidential information point Mr. Bangert, the counsel for the committee, called me a few days before the hearings and told me exactly what documents he considered not confidential and what documents he considered confidential. It was only one document that he agreed should be considered confidential, and that was not used.

The foregoing represents a true and accurate record of my statement taken by the staff of the Antitrust and Monopoly Subcommittee on November 9, 1972. I have no exceptions to the transcript of my testimony as transcribed.

Signed J. LUCIAN SMITH, 1–12–73.
Signed JAMES R. EVANS, 1–12–73.
JERRY HENDERSON, 1–12–73,
Notary Public, Fulton County, Georgia.

My commission expires Feb. 16, 1976.

COCA-COLA BOTTLING COMPANY OF TAFT (INC.),
Taft, Calif., September 30, 1972.

Hon. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: I am writing this letter to reply to several points raised in a letter dated September 18, 1972, from J. Lucian Smith, President of Coca-Cola USA to you. Your Subcommittee has graciously made a copy of that letter available to me since it relates directly to my earlier letter telling you of The Coca-Cola Company's apparent retaliation against me after I testified before your Subcommittee.

There are three general areas in Mr. Smith's letter that I want to answer. These are: (1) my 150% quota, how it was established and how it is administered; (2) my telephone conversations with Mr. James Evans of the Coca-Cola Company; and (3) my relationship with Thriftimart, Inc.

First, I want to describe the origins of the quota system which The Coca-Cola Company has imposed upon me. Ever since January of 1971, I have been attempting to purchase large quantities of Coca-Cola syrup and canned Coca-Cola products to supply certain large warehouse customers in my territory who intend to resell the product in Los Angeles and in other areas outside of my franchised territory. The Coca-Cola Company has refused to fill many of my orders, and this has resulted in my filing an antitrust action against them in the United States District Court for the Central District of California (The Coca-Cola Bottling Company of Taft v. The Coca-Cola Company, Civil Action No. 71–270–LTL). From January, 1971, through August, 1971, the Coca-Cola Company refused to honor most of my orders, but they did fill some orders, apparently on a random and arbitrary basis. Finally, in August, 1971, I was informed by the manager of Coca-Cola's San Leandro California Canning plant, a Mr. Gibson, that the company had turned over to Mr. Gibson, Mr. Bob Daniels, the manager of the

company's Los Angeles syrup plant and Mr. Don Wilson, who I believe is the supervisor of both Mr. Gibson and Mr. Daniels, the problem of determining how much syrup they would sell to me. These men concluded that I should be limited to a quantity of syrup each month equal to 150% of the quantity of syrup which I purchased during the corresponding calendar month of 1970. The quota as originally described to me and as always applied since then has been on a month-by-month basis, and has never been on an annual basis. Details of how the quota was established, which I have summarized above, were included in my affidavit dated August 16, 1971, which was filed in my antitrust suit against The Coca-Cola Company. A copy of my affidavit is enclosed with this letter.

I have tabulated my purchases of syrup from The Coca-Cola Company on a monthly basis since January, 1970. In each of these months I have purchased every drop of syrup which the Company was willing to sell to me. Ever since they told me they were limiting my syrup supply, I have made a practice of asking them every month how much syrup I could have, and I have purchased the amount they determined to give me. The first table shows the purchases of only Coca-Cola syrup, and the second table shows the total syrup purchases (Coca-Cola plus Fresca, Tab, Simba, Sprite and Fanta syrup).

COCA-COLA SIRUP

Month	1970 gallons	1971 gallons	Percent increase or (decrease) for month	1972 gallons	Percent increase or (decrease) for month
January	540	1,019	89	888	64
February	324	378	17	594	83
March	594	1,158	95	1,188	100
April	648	864	33	1,134	75
May	432	725	68	864	100
June	810	617	(24)	2,349	190
July	648	1,281	98	1,521	135
August	756	1,073	44	1,073	42
September	540	926	73		
October	540	501	(7)		
November	432	756	75		
December	432	641	63		
Total	6,696	9,939	48	9,611	102

TOTAL SIRUP

Month	1970 gallons	1971 gallons	Percent increase or (decrease) for month	1972 gallons	Percent increase or (decrease) for month
January	565	1,073	90	1,020	80
February	486	403	(71)	648	33
March	594	1,416	138	1,296	117
April	838	1,174	40	1,134	35
May	511	1,314	157	918	79
June	1,087	1,236	14	2,376	118
July	838	2,520	201	1,653	97
August	885	1,402	58	1,073	21
September	635	1,815	185		
October	635	1,121	76		
November	505	795	58		
December	505	772	52		
Total	8,084	15,041	86	10,118	74

These tables clearly show that the announced "quota" allowing me a 50% increase has not even been loosely enforced. For instance, if the quota is based on Coca-Cola syrup alone, on a month-by-month basis, my Coca-Cola syrup purchases as limited and determined by the Company have ranged, for no reason ever revealed to me, from a decrease of 24% to an increase of 190%. During the entire year of 1971, my Coca-Cola syrup purchases were up 48%, and during the period of January 1 through August 31, 1972, my Coca-Cola syrup purchases when compared to the corresponding period in 1970, are up 102%. If my quota

is based on the total syrup purchases during the time period in question, the monthly figures have varied from a decrease of 17% to an increase of 201%. On that basis, in 1971, I had an increase of 86% and so far this year have had an increase of 74%. From these tables, I think it clear that The Coca-Cola Company has not in the past made any consistent, intelligent attempt whatsoever to enforce the 50% increase quota. My purchases were determined solely by the Company, and they never told me that they were allowing me to draw any excess against a yearly quota.

Considering these figures, it seems an extreme coincidence that, 10-days after I testified before your Subcommittee I was "reminded" by Mr. Evans that my 1971 quota was for only 12,126 gallons of syrup and that I had a remainder of only 2,202 gallons in the unfilled quota for the rest of the year. It strains credibility even further to believe that, approximately 2-weeks later, the Company learned that, because of "administrative errors", I received more than my quota in 1971, and then decided that, out of "fairness" to me, the Company would now change my 1972 quota to be equal to the actual 1971 purchases, plus a 7% growth factor.

I believe it is obvious what really happened. There is simply no believable explanation for the sudden cut-off of my syrup supply except that the Company was unhappy with my testimony before your Subcommittee. The Company's abrupt change of position probably occurred when some cooler person heard about the situation and immediately recognized the outrageousness of this kind of retaliation against a witness for testifying before your Subcomittee. The only unanswered question is whether or not the Company changed their position after they heard of my letter of August 29 to your complaining about their retaliation, or whether they realized on their own that their earlier high handed actions (which they are accustomed to using in dealing with any nonconforming bottlers) were an affront to the Senate and must be stopped. I do not believe it really too important which factor motivated the change of position.

Mr. Smith's letter of September 18, 1972, can now be seen for what it really is. It is nothing in the world but an artfully worded and clever rationalization after the fact of the company's initial crude attempt to express their displeasure with me and their subsequent attempt to whitewash that retaliatory act. This letter attempts to do this by manufacturing, long after the fact, a nonexistent annual quota of 12,126 gallons of syrup. If there ever was such an annual quota of 12,126 gallons, they certainly kept it a secret from me.

Next, I want to reply to the statement on page 4 of Mr. Smith's letter, that Mr. Evans did not make the "I am only following orders" statement attributed to him by me. As far as I am aware, Mr. Smith was not a party to the telephone conversation between Mr. Evans and myself, nor did he over hear it. Obviously, I was a party to that conversation, and I repeat that Mr. Evans did make the statements which I attribute to him. I am perfectly willing to testify to this under oath at any time and place that is convenient to your Subcommittee.

Finally, I want to comment upon my relation with Thriftimart, Inc. Mr. Smith, in his letter, has adopted the sly inuendo "Thriftimart-Taft" to imply that my dispute with his company is somehow merely a business dispute between two giant entities. This is not the truth, and Mr. Smith knows it is not. At the time I began my fight with the company, I had had no business dealings whatsoever with Thriftimart, and did not know a single person at that company. It was only many months after my litigation with The Coco-Cola Company had begun that I had my first contact with the Thriftimart people, which contact eventually led to the sale by me of 51% of the stock of my company to Thriftimart. Prior to that time, my family had operated our business in Taft, California, since 1935. The sale, as far as I was concerned was a necessity forced on me by the actions of The Coca-Cola Company.

Ever since the sale of the stock to Thriftimart, I have continued in complete charge of the operation, and am the Chief Executive Officer of the Company. As such, I am responsible only to the Board of Directors, which still consists entirely of members of my family. Thriftimart has no representation on that Board and has been a completely passive investor in the Company. I did not really wish to have to sell any part of my family business to another party, but I was forced to do so by extreme economic pressure when The Coca-Cola Company began their illegal activities against me and attempted to drive me out of business. The Coca-Cola Company is fully aware of the financial relationship between me and Thriftimart, Inc., since they have taken both my deposition and the deposition of Robert Laverty, President of Thriftimart,

Inc., at some length in the above mentioned litigation. Having forced me to sell part of my business, it is less than candid of them to attempt to portray my opposition to their tactics as motivated by any relation with Thriftimart. It is well known to them that the relationship did not come about until long after I had begun my fight against their antitrust violations.

I hope that this letter is helpful to you in understanding and appreciating The Coco-Cola Company's apparent attempts to harrass me after testifying before your Subcommittee. I would appreciate it if you would make this letter a part of the record along with Mr. Smith's, and if you desire additional information or if you would like me to testify on the facts in this letter, I would be more than willing to do so. I am sorry I am unable to deliver this letter to your office in person as Mr. Smith did his, but I do not have sufficient staff to operate my small business in my absence, and cannot afford such trips to Washington. I also do not have a public relations staff to construct elaborate explanations of administrative error in an effort to excuse acts of sheer economic ruthlessness and corporate arrogance.

Very truly yours,

W. P. FOSTER.

Attorneys for plaintiff: Reagin and Braunstein, Attorneys at Law, 1160 Kirkeby Center, 10889 Wilshire Boulevard, Los Angeles, California 90024.

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 71–270, Third Affidavit of William P. Foster

THE COCA-COLA BOTTLING COMPANY OF TAFT, (INC.), PLAINTIFF.

THE COCA-COLA COMPANY, A CORPORATION, AND CANNERS FOR COCA-COLA BOTTLERS, INC. DEFENDANTS.

William P. Foster, being duly sworn, deposes and says that:

1. I am President and Chief Executive Officer of plaintiff, The Coca-Cola Bottling Company of Taft, (Inc.), (hereinafter, Taft).

2. It is the business of Taft to purchase Coca-Cola syrup from defendant The Coca-Cola Company (hereinafter, Coca-Cola) to use that syrup to bottle and sell Coca-Cola products in bottles and to obtain canned Coca-Cola products from defendant Canners for Coca-Cola Bottlers, Inc. (hereinafter, Canners) for sale to its customers.

3. Taft obtains canned Coca-Cola products from Canners under a Canning Agency Agreement under which Canners purports to be the agent of Taft to provide canning services for Taft. A copy of that Agency Agreement is attached as Exhibit 1 to this Affidavit. The form of that Agency Agreement was determined by Coca-Cola, who also approved the Agreement. As is stated in paragraph 5 of the Affifidavit of Walter L. Susong, Vice President of Coca-Cola, already on file in this action, Canners is a wholly-owned subsidiary of Coca-Cola. When Taft orders canned Coca-Cola products from Canners, Canners ships the product to Taft. Coca-Cola bills Taft for the syrup used in the shipment plus the cost of other materials, such as cans and cartons. As a "convenience" to Taft, Coca-Cola also bills Taft for the processing fee charged by Canners and for freight charges for transporting the canned Coca-Cola products from Canners' plant to Taft's plant. A typical invoice to Taft from Coca-Cola for a shipment of canned Coca-Cola products is attached as Exhibit 2 to this Affidavit. Taft exercises no control over the operations of Canners, which is totally controlled by its parent corporation, Coca-Cola. In fact, Canners is in no way an agent of Taft but is instead, the vehicle through which Coca-Cola sells canned Coca-Cola products to bottlers such as Taft for subsequent distribution by the bottler.

4. Taft obtains the Coca-Cola syrup which it uses to bottle Coca-Cola products from Coca-Cola's Los Angeles syrup plant. Taft is required by its Bottler's Contract to purchase all of its Coca-Cola syrup from Coca-Cola. However, even if Taft were free to purchase syrup elsewhere, there is not other source of Coca-Cola syrup. Since syrup has a limited shelf life of about 30 days, it is my practice to order syrup several times a month. Taft upsually maintains an inventory of no more than one week's supply of syrup. Until the incidents of August 10, 1971 and August 12, 1971 described below on this Affidavit, Coca-Cola's Los Angeles syrup plant had never refused to ship any order for syrup to Taft.

5. In addition to syrup for its own bottling operation, Taft has ordered large quantities of canned Coca-Cola products from Canners. However, Canners,

acting under orders from Coca-Cola, has refused to fill most of Taft's orders for canned Coca-Cola products. I have been informed on several occasions by Canners that they only fill Taft's orders on a case-by-case basis with prior approval from Coca-Cola. Taft has usually received one truck load (or 1980 cases) of canned Coca-Cola products per month. Taft has sometimes received two such truck loads per month.

6. On August 3, 1971 Taft ordered 1980 cases of canned Coca-Cola products from the San Leandro, California plant of Canners, which order consisted of 330 cases of Coca-Cola, 330 cases of Simba, 660 cases of Tab and 660 cases of Fresca. On August 4, 1971 Taft ordered an additional 5,940 cases of canned Coca-Cola from Canners. These orders were placed by me by telephone and confirmed in letters subsequently mailed to Canners, which is my usual procedure for ordering canned Coca-Cola products. On August 9, 1971 I telephoned Canners to confirm the dates of shipment of the above mentioned orders for canned Coca-Cola products. It is my usual practice to confirm such orders by telephone after several days so that I can make the necessary unloading and storage arrangements to handle the cases of canned products. In that tlephone call, I was informed that orders would have to be approved by Mr. Gibson, the Manager of the San Leandro plant of Canners, and that Mr. Gibson was not then available. On August 10, 1971 Mr. Gibson telephoned me. He told me that the entire problem of Taft attempting to obtain adequate quantities of Coca-Cola syrup to meet the demands of its customers had been "dumped in the laps" of Mr. Gibson, Bob Daniels, the Manager of Coca-Cola's Los Angeles syrup plant and Mr. Don Wilson, who is an employee of Coca-Cola.

I believe Mr. Wilson is in some manner the supervisor of both Mr. Gibson and Mr. Daniels. Mr. Gibson further informed me that Messrs. Gibson, Daniels and Wilson had decided to limit Taft to a quantity of Coca-Cola syrup each month equal to 150% of the quantity of syrup which Taft purchased during the corresponding calendar month of 1970. He stated that, under this formula, when a previously placed order for 1980 cases of canned Coca-Cola was filled, Taft would have a remaining allotment of 12 gallons of syrup for the month of August, 1971. This is enough syrup to bottle approximately thirty cases of Coca-Cola. Mr. Gibson further told me that a previously placed order for 1980 cases of Coca-Cola would be delivered that day (which order was subsequently received by Taft that day) but that the Coca-Cola portion of the 1980 case order which was placed on August 3 would not be delivered, that none of the 5940 cases of Coca-Cola ordered on August 4 would be delivered, that no additional canned Coca-Cola would be delivered in August and that Coca-Cola's Los Angeles syrup plant would only deliver an additional 12 gallons of Coca-Cola syrup in August. Mr. Gibson told me that he would consider further whether or not he would ship the other Coca-Cola products, such as Tab, Fresca, Simba or the like.

7. Later in the day of August 10, 1971 I telephoned Mr. Gibson to inquire about the possible shipment of the other Coca-Cola products. He told me that since our earlier conversation described above, he had decided that the 150% limitations was to be applied to the total quantity of syrup of all kinds to be sold to Taft, and that accordingly no additional canned products of any kind would be delivered in August. He stated that he had notified Coca-Cola in Atlanta, Georgia of his decision.

8. On August 12, 1971, I attempted to order by telephone an additional five barrels of Coca-Cola syrup and one barrel of Fresca syrup from Coca-Cola's Los Angeles syrup plant. They refused to accept my order. The persons to whom I talked refused to tell me their names.

9. Since the commencement of this action, Taft has continued to supply Coca-Cola products to its long established customers in its territory as defined in the Bottler's Contract which is Exhibit 1 to the complaint in this action. Taft has also supplied quantities of Coca-Cola products in its territory to cerain customers who had not purchased from Taft prior to 1971, such as Tomac, Safeway and Thriftimart. I have been advised by legal counsel that Taft cannot legally restrict what any of its customers do with any product once they purchase it from Taft, so I have made no attempt to control what these new customers have done with any products purchased from Taft. I have been further advised by legal counsel that any provisions in Taft's Bottler's Contract which restrict the territory in which Taft can sell Coca-Cola products are invalid, but because of the limited quantity of Coca-Cola products which Coca-Cola and Canners have supplied Taft, Taft has not sold any Coca-Cola products outside of its territory.

10. Taft presently has only approximately 100 gallons of Coca-Cola syrup on hand. If Taft does not obtain additional syrup, it will run out of syrup by August 18, 1971. After that day, Taft will no longer be able to bottle products to sell to any of its customers. It is my practice to deliver Coca-Cola products to my retail customers in and around Taft at least twice a week. They expect this service and it is necessary in order to retain their good will. If Taft has no Coca-Cola products to deliver after August 18, 1971, it will lose their valuable goodwill which it has acquired during 36 years of doing business. If Taft is unable to supply their needs for Coca-Cola products, they will be forced to satisfy their needs elsewhere, either by obtaining Coca-Cola products from wholsesale grocers, if they have access to such wholesale grocers or by switching their business to other products such as Pepsi-Cola. In either event, it will be very difficult for Taft to regain their patronage.

11. In my Affidavit of February 8, 1971, already on file in this action, I described how I have been informed by Coca-Cola that Taft's bottling facilities must be replaced. Our present facility is over 35 years old. In addition to being an uneconomic facility relative to newer facilities, the building does not comply with the present State Health Code. Taft has been inspected several times in recent months by the representatives of the State Health Deparment. They have informed me, as has inspecors from Coca-Cola, that our facilities do not comply with the State Code and that they see no way the present facilities can be modified to comply. They have told me that a new plant must be built. I have told them that I wish to build a new plant, but I am unable to do so at the present time because I am unable to obtain adequate quantities of syrup to bottle in the new plant. They have informed me that if we do not take prompt steps to begin building a new facility, they will have no choice but to order that our present facility be closed.

12. It is now possible for Taft to build a new, modern facility which fully complies with the Health Code if we can obtain assurances of an adequate supply of syrup. Taft now has purchase orders from responsible customers for more than 3,000,000 cases of Coca-Cola products per year. Thriftimart has also purchased from me 51% of the outstanding shares of Taft Thriftimart is willing to finance the construction of a facility of sufficient size to fill these orders if we can be assured an adequate supply of syrup. See the accompanying Affidavit of Robert E. Laverty, President and Chairman of the Board of Thriftimart.

13. In my affidavit of February 3, 1971, already on file in this action, I stated that Coca-Cola had announced a policy of reducing the number of bottlers. There are presently about 840 bottlers of Coca-Cola. On July 29, 1971, in a meeting which I attended in Atlanta, Georgia with J. Lucian Smith, President of the Coca-Cola USA division of Coca-Cola, Mr. Smith stated that Coca-Cola intended to reduce the number of bottlers to 78. Taft wishes to be one of those 78 surviving bottlers. At the present time Taft is one of the smallest Coca-Cola bottlers in the country. I believe we are the smallest bottler in California. During 1970 we purchased from Coca-Cola 6696 gallons of syrup, which is enough syrup to bottle approximately 20,000 cases of 12-ounce containers of Coca-Cola. It is obvious that if Taft obtains enough syrup to fill the above mentioned orders for over 3,000,000 cases per year from our new customers, it will survive as a healthy competitor in the Coca-Cola business. It is equally obvious that if Coca-Cola continues to limit Taft's syrup supply to 150% of its 1970 purchases, our new customers will leave us, and Taft's chances for survival in the forthcoming reduction of bottlers is practically non-existent.

14. Unless this Court grants relief, Taft will be unable to supply the requirements of any of its customers wherever located and whatever size, and will lose the goodwill of all of its customers. Without the continuing business of its long established customers, its new customers and other business which it can obtain with an adequate supply of Coca-Cola syrup and Coca-Cola in cans, Taft will be unable to continue in business. As a result Taft will be forced out of business before its rights can be determined in this litigation.

Dated: August 16, 1971 at Newhall, California.

William P. Foster.

State of California, *County of Los Angeles, ss:*

Subscribed and sworn to me on this 16th day of August, 1971.

Marjorie E. Stewart,
Notary Public in and for Said County and State.

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